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What a Difference a Day Makes, or Does It? Work/Family Balance and the Four-Day Work Week

MICHELLE A. TRAVIS

This Article considers the growing reliance that four-day work week advocates have placed on work/family claims. It begins by analyzing whether a compressed work schedule may alleviate work/family conflicts, and more importantly, for whom such benefits are most likely to accrue. While studies consistently find that many workers experience lower levels of work/family conflict when working a compressed schedule, the research also suggests that workers with the most acute work/family conflicts may be the least likely either to obtain or to benefit from a four-day work week design. Nevertheless, the political climate surrounding the four-day work week provides a unique opportunity for action. This Article therefore considers how legal regulation might be used to shape four-day work week initiatives as a work/family balance tool. In particular, the Article considers how reflexive law proposals might contribute to the four-day work week debate. While existing reflexive law models typically rely on the creation and exercise of procedural rights vested in individual workers, this Article explores an under-developed alternative that would instead vest procedural rights primarily in workers as a group. The Article uses California's extensive four-day work week regulations and the Federal Employees Flexible and Compressed Work Schedules Act to illustrate this "collective reflexive" approach, and to explore what this type of regulatory model might offer advocates who are seeking to facilitate greater work/family balance for those who may need it the most.

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What a Difference a Day Makes, or Does It?

Work/Family Balance and the Four-Day Work Week

MICHELLE A. TRAVIS*

I. INTRODUCTION

One of the themes that proponents of the four-day work week have been increasingly relying upon is the potential benefit that a compressed work schedule may provide for workers who are balancing paid work with family care. This work/family theme, however, frequently shows up as an afterthought rather than as a driving force in shaping the development of four-day work week policies. For example, the Federal Employees Flexible and Compressed Work Schedules Act,¹ which encourages federal agencies to offer their employees compressed work schedules, was initially pitched in the 1970s as a traffic congestion measure.² Two decades later, the Clinton administration began touting the Act as a model program for building a family-friendly workplace, even though no meaningful work/family research had informed the Act's enactment or design.³ This Article considers the growing reliance that four-day work week advocates have placed on work/family claims. Specifically, it analyzes both the extent to which a compressed work schedule may alleviate work/family conflicts, and more importantly, for whom such benefits are most likely to accrue. The goal of this analysis is to help better inform and position work/family advocates to more effectively steer the four-day work week debate.

Part II begins by reviewing the existing social science literature on the work/family impact of compressed work schedules. Most of this research has focused on the threshold inquiry of whether or not a four-day work week can alleviate work/family conflict for those workers who gain access to a compressed work schedule. As Part II.A explains, this research

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¹ 5 U.S.C. §§ 6120–6133 (2006). This law also is referred to as the Alternative Work Schedules Act (“AWSA”). Janet M. Liechty & Elaine A. Anderson, *Flexible Workplace Policies: Lessons from the Federal Alternative Work Schedules Act*, 56 FAM. REL. 304, 305 (2007). For a description of the legislative history of the AWSA, see *infra* notes 38–45 and accompanying text.

² See Liechty & Anderson, *supra* note 1, at 307.

³ See *id.* at 307–10 (explaining how the AWSA, which “was first meant to deal with Washington, DC traffic congestion in 1978,” ultimately became “a centerpiece of federal family-friendly policies by 1997,” without any meaningful consideration of work/family research).

appears quite positive on its face by consistently finding that many workers' self-reported levels of work/family conflict are lower when working a compressed schedule than for workers laboring under a more traditional five-day work week.⁴ While certainly promising, these research results provide an insufficient basis, on their own, either for asserting generally that the four-day work week enhances work/family balance, or for prioritizing four-day work week initiatives over other work/family policies. Such conclusions demand an additional level of research that moves beyond just identifying a link between the four-day work week and reduced work/family conflict, to also considering *which* workers will likely experience such positive results.

Undifferentiated claims about the work/family benefits of a four-day work week often are premised on an assumption of a homogeneous workforce facing homogeneous work/family conflicts. Part II.B challenges that assumption, not only by considering the types of workers who are least likely to experience work/family benefits from a four-day schedule, but also by identifying the large population of workers who are unlikely to gain access to a four-day work week altogether. The research suggests that workers with the most acute work/family conflicts often will be among those least likely either to obtain or to benefit from a four-day work week. This is in part the result of the growing bifurcation of the workforce into very long-hour, full-time positions and very short-hour, part-time jobs.⁵ Since 1970, the forty-hour work week—which often is associated with relatively low initial levels of work/family conflict and which is most easily transitioned into a four-day schedule—has become increasingly less typical.⁶ In contrast, the growing workforce laboring in jobs at both ends of the emerging “time divide”—i.e., jobs that are least likely to be redesigned into a four-day work week—often experience the highest levels of work/family conflict, from very different sources, which will require very different solutions to address.⁷ Part II.B also questions the ability of the four-day work week to meaningfully alter the existing gendered division of labor that contributes to the severe work/family conflicts experienced by many women who are combining paid work with disproportionate family care.

Although the conclusions in Part II thus raise doubts about whether a four-day work week should find its way to the top of a work/family advocate's policy agenda, Part III recognizes that the current business, media, and political attention being paid to the four-day work week

⁴ See *infra* notes 12–36 and accompanying text.

⁵ See JERRY A. JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY* 5, 36, 60 (2004); see also *infra* notes 66–79 and accompanying text.

⁶ See JACOBS & GERSON, *supra* note 5, at 32–33, 33 fig.1.4; see also *infra* notes 66–68 and accompanying text.

⁷ See JACOBS & GERSON, *supra* note 5, at 5; see also *infra* notes 69–79 and accompanying text.

provides a unique opportunity for action. Part III therefore considers how legal regulation of the four-day work week might shape this particular form of workplace flexibility most effectively as a work/family initiative.

To that end, Part III begins by considering the three major approaches that have dominated work/family discourse about workplace flexibility more generally. On one end of the spectrum are top-down “command-and-control” approaches that rely on prescriptive rules and sanctions for non-compliance.⁸ On the other end of the spectrum are forms of market-based governance, which focus not on legal intervention but on making the business case for flexibility to maximize voluntary and efficient experimentation with working time innovation.⁹ In the middle of these two extremes lies the burgeoning “new governance” literature, which emphasizes public oversight of private, regulatory initiatives, including various forms of “reflexive law,” which focus on procedural rather than substantive obligations to facilitate information exchange and self-regulation.¹⁰ The new governance scholars have made a compelling case that this middle-ground approach may provide a viable solution both to regulatory and market failures by recognizing that “economic efficiency and democratic legitimacy can be mutually reinforcing.”¹¹

While the reflexive law proposals within the new governance approach have much to offer work/family advocates who are considering effective regulation of the four-day work week, these proposals typically rely on the creation and exercise of *individual* worker rights. Part III uses California’s extensive four-day work week regulations and the Federal Employees Flexible and Compressed Work Schedules Act as two examples of a different reflexive approach—one that vests procedural rights primarily in workers as a group, rather than as individuals. Part III explores this “collective reflexive” approach as one additional regulatory method for work/family advocates to consider when entering the four-day work week debate. While Part III ultimately concludes that California’s approach, in particular, may be too complicated to be truly effective, these examples nevertheless illustrate an important and under-developed regulatory model for expanding workplace flexibility to facilitate greater work/family balance for those who may need it the most.

⁸ See *infra* notes 100–10 and accompanying text.

⁹ See *infra* notes 111–22 and accompanying text.

¹⁰ See *infra* notes 123–25 and accompanying text.

¹¹ See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004); see also *infra* note 125 and accompanying text.

II. THE FOUR-DAY WORK WEEK AND WORK/FAMILY BALANCE: MOVING FROM “WHETHER OR NOT?” TO “FOR WHOM?”

This section reviews the existing social science research on the work/family impact of compressed work schedules. It begins by asking whether or not any link has been established between a four-day work week and reduced work/family conflict. While the research answers this question in the affirmative, this section goes on to explore, more specifically, for whom such benefits are most likely to accrue. Because the research suggests that workers with the most acute work/family conflicts often may be among those least likely either to obtain or to benefit from a four-day work week, this section raises doubts as to whether work/family advocates should—if writing on a clean slate—prioritize four-day work week initiatives over other work/family policy measures.

A. *Whether or Not?*

Although four-day work week advocates rarely cite research to support their sweeping assertions of work/family benefits, the totality of the research indeed has established that such a link exists in certain circumstances. These studies typically rely on worker surveys that provide self-reports of work/family conflict levels. They attempt to establish a causal connection between compressed work schedules and reduced work/family conflict by comparing the responses of workers on a compressed schedule to workers on a more traditional schedule, or by asking workers to make a before-and-after comparison of their own experience after moving from a traditional to a compressed work week. As a whole, this body of research provides a fairly optimistic assessment of the potential for the four-day work week to serve as a work/family balance tool.

One of the best examples of this type of research is a study conducted by leading sociologists Rex L. Facer II and Lori Wadsworth.¹² In this study, Facer and Wadsworth analyzed whether a compressed work week affected self-reported levels of work/family conflict in a group of city government workers in a small but growing western community.¹³ In 2003, the city had shifted workers in some of its departments to a four-day, ten-hour per day work week (also known as a “4/10”), which generally was

¹² See generally Rex L. Facer II & Lori Wadsworth, *Alternative Work Schedules and Work Family Balance: A Research Note*, 28 REV. PUB. PERSONNEL ADMIN. 166 (2008), available at <http://rop.sagepub.com/cgi/content/abstract/28/2/166> [hereinafter Facer & Wadsworth, *Alternative Work Schedules*]. For updated commentary on this study, presented at this Symposium, see generally Rex L. Facer II & Lori L. Wadsworth, *Four-Day Work Weeks: Current Research and Practice*, 42 CONN. L. REV. 1031 (2010).

¹³ Facer & Wadsworth, *Alternative Work Schedules*, *supra* note 12, at 166–68.

scheduled from 7:30 a.m. to 6:00 p.m., Monday through Thursday.¹⁴ To obtain comparative results, Facer and Wadsworth surveyed both workers who had switched to the compressed work week and workers who had remained on a more traditional schedule of five working days per week.¹⁵

The surveys included six variables that assessed both work-to-family conflict (i.e., the extent to which work impacts family life) and family-to-work conflict (i.e., the extent to which family life impacts work).¹⁶ The researchers asked respondents to assess each variable on a scale of one (strongly disagree) to five (strongly agree).¹⁷ The work-to-family conflict variables asked workers whether they came home from work too tired, whether their work took away from their personal interests, and whether their work took up time that they would rather spend with family or friends.¹⁸ The family-to-work variables asked workers whether they found themselves too tired at work because of activities at home, whether their personal demands took away from their work, and whether their personal lives took up time that they would rather spend at work.¹⁹ The researchers also asked those working the four-day schedule to assess the extent to which the compressed work week had made their childcare arrangements more difficult.²⁰

Overall, the results support the view that a four-day work week facilitates work/family balance. Workers on the four-day work week reported lower levels of work/family conflict than workers on more traditional schedules on five of the six variables examined, with four of those differences registering at a statistically significant level.²¹ When the individual variables were combined into two overall scales—one for work-to-family conflict and one for family-to-work conflict—the workers on the four-day schedule reported lower levels of conflict at statistically significant levels on both scales.²²

In a multivariate analysis, Facer and Wadsworth demonstrated that the lower levels of work-to-family conflict experienced by those on the four-day schedule existed even when holding other variables constant, including job satisfaction levels, the number of dependants living in the worker's home, the worker's age, and the worker's length of employment with the

¹⁴ *Id.* at 168.

¹⁵ *Id.* at 168–69. The researchers received 132 usable surveys, and sixty percent of those respondents were working the four-day, ten-hour-per-day schedule. *Id.* at 169–70.

¹⁶ *Id.* at 172, 172 tbl.4.

¹⁷ *Id.* at 172 tbl.4.

¹⁸ *Id.* at 172–73, 172 tbl.4.

¹⁹ *Id.*

²⁰ *Id.* at 170–71, 171 tbl.2.

²¹ *Id.* at 172–73, 172 tbl.4. The two groups provided similar responses on the remaining variable: feeling too tired at work because of home activities. *Id.* at 172 tbl.4, 173.

²² *Id.*

city.²³ The worker's age, number of dependants at home, and length of employment with the city also had no influence on the level of family-to-work conflict, which was influenced most heavily by a worker's rating on the work-to-family conflict scale.²⁴ Additionally, only 2.7% of the respondents who had moved to the four-day work week agreed or strongly agreed that childcare arrangements had become more difficult under the compressed work schedule.²⁵ Based on these results, Facer and Wadsworth concluded that "employees working the 4/10 work-week experience lower levels of work-family conflict than their counterparts who are working other schedules in the city."²⁶

This study followed an earlier project that reported similar results in the late 1990s.²⁷ In that prior project, sociologist Michael J. Gilbert and political scientist Arturo Vega studied how the move from a five-day per week schedule to a three-day compressed work week affected self-reports of work/family conflict among patrol officers at a Texas county sheriff's department.²⁸ The researchers surveyed officers who had been assigned to patrol for at least one year both before and after the compressed work week was implemented and asked them to compare their experiences on the traditional and the compressed work schedules.²⁹ Over eighty-five percent of these patrol officers reported that the compressed work week schedule made it "'easier' or 'much easier' to devote time to family members," and over seventy-six percent reported finding it "easier to conduct family and personal activities."³⁰

One of the earliest formal studies on the four-day work week found strikingly similar results in 1970 using interviews and written surveys of 148 workers who had a four-day schedule at thirteen different firms engaged in the manufacturing, service, and retail industries.³¹ In that

²³ *Id.* at 173–74, 174 tbl.6.

²⁴ *Id.* at 174–75, 175 tbl.7.

²⁵ *Id.* at 170–71.

²⁶ *Id.* at 175. See also Lori L. Wadsworth & Rex L. Facer II, *Does the Four Day Work Week Work?*, FOX NEWS, July 7, 2009, http://foxnews.com/printer_friendly_story/0,3566,530392,00.html (reporting on a follow-up study that surveyed 150 human resource directors, fifty-four percent of whom reported improved work/family balance as an organizational benefit of alternative work schedules).

²⁷ See generally Arturo Vega & Michael J. Gilbert, *Longer Days, Shorter Weeks: Compressed Work Weeks in Policing*, 26 PUB. PERSONNEL MGMT. 391 (1997).

²⁸ See *id.* at 391. In 1993, these workers moved from a traditional five-day work week to a three-day work week with each work day consisting of thirteen hours and twenty minutes of work. *Id.* at 391, 393. The research results were based on surveys of 103 officers who had been assigned to patrol for both one year before and one year after the move from a traditional five-day, forty-hour work week to the compressed three-day, forty-hour work week. *Id.* at 393.

²⁹ *Id.* at 393.

³⁰ *Id.* at 395.

³¹ James L. Steele & Riva Poor, *Work and Leisure: The Reactions of People at 4-Day Firms*, in 4 DAYS, 40 HOURS: REPORTING A REVOLUTION IN WORK AND LEISURE 105, 105–07, 111, 115 (Riva Poor ed., 1970). The study also included twenty managers. *Id.* at 106. Of the 148 workers included in the study, eighty-four were males and sixty-four were females. *Id.* Most of the workers were factory personnel, with a smaller number of office, sales, and professional personnel as well. *Id.* at 106–07.

study, seventy-five percent of the workers reported spending more time with their families when working a four-day work week rather than a five-day schedule.³² In response to an open-ended question asking the workers to list advantages of the four-day work week, twenty-five cited the benefit of increased family time.³³

These findings are consistent with other studies on the work/family effects of a compressed work week both within and outside the United States.³⁴ These include, among others, a recent meta-analysis of forty studies from around the world that analyzed the effects of a compressed work week on workers performing shift work, which the researchers defined as any schedule that regularly includes work time outside of standard business hours.³⁵ The majority of these studies found improvements in workers' reported levels of work/family balance after the compressed work week was introduced.³⁶ As a whole, this body of research is quite promising. By demonstrating that a causal link can exist between compressed work schedules and improved work/family balance, this research takes the important first step of validating consideration of four-day work week initiatives within a work/family agenda.

The firms were primarily in the greater Boston area, although some were located in California, Florida, and Oklahoma. *Id.* at 107. For reflections on the historical context of the four-day work week presented at this Symposium, see generally Riva Poor, *How and Why Flexible Work Weeks Came About*, 42 CONN. L. REV. 1047 (2010).

³² Steele & Poor, *supra* note 31, at 115.

³³ *Id.* at 111 & tbl.3.

³⁴ See, e.g., C. Bambra et al., "A Hard Day's Night?" *The Effects of Compressed Working Week Interventions on the Health and Work-Life Balance of Shift Workers: A Systematic Review*, 62 J. EPIDEMIOLOGY COMM. HEALTH 764, 766, 768–73 (2008) (conducting a meta-analysis of forty studies from around the world and concluding that the majority of studies found that a compressed work week improved work/family balance for shift workers); E. Jeffrey Hill et al., *Finding an Extra Day a Week: The Positive Influence of Perceived Job Flexibility on Work and Family Life Balance*, 50 FAM. REL. 49, 53–54 (2001) (summarizing the results of a large-scale survey of employees at IBM Corporation in 1996 that found that the availability of various flextime policies, including the compressed work week, reduced the percentage of workers who reported work/family conflicts); Liechty & Anderson, *supra* note 1, at 306 (noting that various government reports have documented work/family benefits for federal employees who gained access to alternative work schedules, including compressed work weeks, under the AWSA); Atefeh Sadri McCampbell, *Benefits Achieved Through Alternative Work Schedules*, 19 HUM. RES. PLAN. 30, 31–32 (1996) (studying federal agency workers and finding that approximately fifty-four percent of those who were providing dependant care were using some type of flexible work arrangement, including compressed work week schedules, and that doing so was "very important to their decision to remain with their agency"); Simcha Ronen & Sophia B. Primps, *The Compressed Work Week as Organizational Change: Behavioral and Attitudinal Outcomes*, 6 ACAD. MGMT. REV. 61, 64–67, 69 (1981) (summarizing studies done in the 1970s and finding that four of the six studies measuring work/family balance reported that a compressed work week had "a positive effect on home and personal life").

³⁵ Bambra et al., *supra* note 34, at 764–65.

³⁶ *Id.* at 768.

B. *For Whom?*

Feminist legal theorists have long challenged the assumption that all forms of workplace flexibility are beneficial for all caregivers.³⁷ As four-day work week advocates place increasing reliance on claims of work/family benefits, there has become an increasing need to apply that insight to this particular context. Specifically, research inquiries must move beyond just proving that a causal link can exist between compressed work schedules and reduced work/family conflict, to also identifying the types of workers for whom such benefits are most and least likely to accrue. This section provides a preliminary assessment of this secondary inquiry by considering which workers are unlikely to experience improved work/family balance while working a compressed schedule, which workers are unlikely to obtain access to a four-day work week, and the likelihood that a four-day work week will make inroads into the gendered division of labor that contributes to work/family conflicts for many women. This analysis provides a much less uniformly positive picture of the four-day work week as a work/family balance tool.

One of the earliest analyses of these critical “for whom” questions was performed during the federal legislative debates over whether to enact the Federal Employees Flexible and Compressed Work Schedules Act—also known as the Alternative Work Schedules Act (“AWSA”)³⁸—on a permanent basis in the early 1980s.³⁹ The AWSA permits and creates incentives for federal agencies to offer both compressed work schedules and flextime, which allows employees to alter their daily start and stop times within certain defined parameters.⁴⁰ The federal government initially enacted the AWSA in 1978 on a three-year experimental basis as a traffic congestion measure and energy savings initiative in response to the energy crisis of the late 1970s.⁴¹ Although one senator mentioned the potential benefits that flextime might provide for workers seeking to balance work with family obligations, personal business, or civic commitments, the initial congressional hearings on the AWSA were neither driven nor

³⁷ See Liechty & Anderson, *supra* note 1, at 310.

³⁸ Federal Employees Flexible and Compressed Work Schedules Act, 5 U.S.C. §§ 6120–6133 (2006); see Liechty & Anderson, *supra* note 1, at 305 (describing the alternative and commonly-used title for the Act, AWSA).

³⁹ See HALCYONE H. BOHEN & ANAMARIA VIVEROS-LONG, *BALANCING JOBS AND FAMILY LIFE* 84, 107–09, 126–29 (1981); see also Liechty & Anderson, *supra* note 1, at 306–07 (describing the Bohen and Viveros-Long research findings).

⁴⁰ See Liechty & Anderson, *supra* note 1, at 306. The AWSA incentivizes the use of compressed work weeks by exempting federal agencies from existing daily overtime premiums if the agency follows certain procedures to adopt the compressed work schedule. See *infra* notes 218–27 and accompanying text.

⁴¹ Liechty & Anderson, *supra* note 1, at 307.

informed by a work/family balance perspective.⁴² Congress re-authorized the AWSA on another three-year experimental basis in 1982 after additional hearings in which a work/family analysis was once again conspicuously absent.⁴³ Congress finally enacted the AWSA on a permanent basis in 1985, and it was not until that third round of hearings that work/family arguments were finally deployed—and then, largely as a convenient afterthought.⁴⁴

It was at the third hearing stage that supporters of the AWSA began making general claims about the AWSA's ability to solve work/family conflicts, relying on a number of government studies of the AWSA during its experimental periods that had provided positive—but undifferentiated—evidence of the AWSA's work/family benefits.⁴⁵ It was in this context that researchers Halcyone Bohen and Anamaria Viveros-Long performed the first rigorous analysis of the work/family effects of the AWSA's experimental use.⁴⁶ Bohen and Viveros-Long particularly were interested in testing two core assumptions upon which the legislative testimony in favor of the AWSA's permanent status implicitly relied: the assumptions that flextime uniformly facilitates work/family balance and that flextime helps equalize the gendered division of domestic work.⁴⁷ This research project focused exclusively on federal agencies' use of flextime under the AWSA, rather than the use of a compressed work week,⁴⁸ but its discouraging conclusions in the former context provide a credible basis for raising concerns about broad-reaching claims of work/family benefits from a four-day work week as well.

In the Bohen and Viveros-Long study, the researchers surveyed 313 employees at a federal agency using a standard five-day work week and 393 employees at a federal agency that permitted flextime.⁴⁹ Employees at the flextime agency could exercise some control over their start and stop times, but their work was still spread out over five days each week.⁵⁰ At a general level, the study's results were consistent with the assertion that flextime reduces work/family conflicts: the mean level of self-reported work/family stress for the overall group of flextime employees was significantly lower than the mean level of self-reported work/family stress

⁴² See *id.* at 307 (describing the remarks of Senator Jacob Javits, a Republican from New York, at the Senate hearings).

⁴³ See *id.* at 308–09 (observing that “the benefits of the AWSA for working mothers and families . . . was curiously sidelined in the 1982 Senate hearings,” and that “[t]he dilemmas faced by increasing numbers of mothers in the workforce were largely ignored in this round of hearings”).

⁴⁴ See *id.* at 309.

⁴⁵ See *id.* at 306, 309.

⁴⁶ See *id.* at 306–07 (describing the Bohen and Viveros-Long research in the context of the legislative history of the AWSA).

⁴⁷ BOHEN & VIVEROS-LONG, *supra* note 39, at 126.

⁴⁸ See *id.* at 84.

⁴⁹ *Id.* at 108–09.

⁵⁰ *Id.* at 84.

for the overall group of employees on a standard five-day schedule.⁵¹ In addition, both parents as a whole and women as a whole reported significantly less work/family stress at the flextime agency than at the agency with a traditional schedule.⁵²

When the researchers differentiated the results further, however, the picture became far less rosy. When focusing solely on mothers, whether married or single, the study found that the ability of flextime to reduce work/family stress “disappear[ed] altogether.”⁵³ Flextime provided no reduction in work/family stress for women who were trying to balance participation in the paid labor market with primary childcare responsibility.⁵⁴ Fathers who had spouses employed outside the home similarly reported no less work/family stress when working flextime versus working a standard schedule.⁵⁵ The only parents for whom flextime reduced work/family conflict were fathers whose wives were not employed outside the home.⁵⁶ The primary groups of employees who reported having less work/family stress on a flextime schedule than on a standard schedule—and whose responses explained the overall finding of flextime’s positive work/family effects—were employees who did not have primary childcare responsibility, including single adults without children, married women without children, and fathers whose wives were not engaged in paid labor.⁵⁷ What the undifferentiated positive survey results thus failed to reveal was the fact that it was employees who began with the lowest levels of work/family conflict who were ultimately helped the most.⁵⁸ “[T]he simpler the family circumstances,” concluded the researchers, “the more relative impact a little schedule flexibility seems to have.”⁵⁹

This revealing study was largely ignored during the legislative debates around the permanent enactment of the AWSA, which nevertheless relied upon asserted work/family benefits as an additional reason for supporting the AWSA on a long-term basis. Although the study focused on flextime rather than a four-day work week, its findings highlight the importance of looking beyond generalized survey results that find work/family benefits for groups of workers as a whole.

In the two most prominent studies of compressed work weeks described above, the published data does not differentiate among workers

⁵¹ *Id.* at 127.

⁵² *Id.*

⁵³ *Id.* at 127–29.

⁵⁴ *See id.* at 129.

⁵⁵ *Id.*

⁵⁶ *Id.* at 128–29.

⁵⁷ *Id.* at 129. *See also* Liechty & Anderson, *supra* note 1, at 306–07 (describing the Bohen and Viveros-Long findings).

⁵⁸ *See* BOHEN & VIVEROS-LONG, *supra* note 39, at 148, 192; *see also* Liechty & Anderson, *supra* note 1, at 306–07.

⁵⁹ BOHEN & VIVEROS-LONG, *supra* note 39, at 148.

within the survey pools to the degree necessary to permit as detailed an analysis as in Bohen and Viveros-Long's study. Nevertheless, considering even the *shared* characteristics of the workers within the survey pools reveals a potentially significant limit to the work/family benefits that were documented in both projects. Most importantly, the workers in both studies shared one crucial similarity: they all worked at or very near a regular, forty-hour work week before the transition to a compressed schedule occurred.

In the Facer and Wadsworth study, which found positive work/family effects from introducing a four-day, forty-hour work week among city government workers, 85.9% of the respondents who were working the four-day schedule reported no change in their overall hours since they transitioned from the five-day work week.⁶⁰ An additional 9.6% of the respondents had experienced a decrease in their overall working hours since moving to the four-day work week⁶¹ (likely due to a decrease in periodic overtime once the regular work day became ten hours per day). In the Vega and Gilbert study of patrol officers, which also found overall positive work/family effects from the adoption of a compressed work week, ninety-seven percent of the respondents were male, and all of them had been working a five-day, forty-hour schedule before transitioning to a three-day, forty-hour week.⁶²

This observation is important in assessing the significance and generalizability of these studies' findings for two related reasons. First, workers who have a regular forty-hour work week are typically among those who experience relatively low levels of work/family conflict as an initial starting point.⁶³ Thus, Bohen and Viveros-Long's conclusion that workers with the least severe work/family conflicts are likely to be helped the most by flextime arrangements may apply to the four-day work week context as well. Second, the percentage of the workforce that regularly works forty-hour-per-week jobs—which are most easily transitioned to a four-day work week—has been decreasing over the last three decades.⁶⁴ Thus, many workers with the most severe work/family conflicts are likely to be among those least likely to gain access to a four-day work week altogether. This is not an indictment of the very important results that both the Facer and Wadsworth study and the Vega and Gilbert study produced

⁶⁰ Facer & Wadsworth, *Alternative Work Schedules*, *supra* note 12, at 170 (noting that only 14.1% of the respondents who worked the four-day schedule reported a change in overall working hours).

⁶¹ *Id.*

⁶² Vega & Gilbert, *supra* note 27, at 393–95.

⁶³ See *infra* notes 71–77 and accompanying text.

⁶⁴ JACOBS & GERSON, *supra* note 5, at 32–33, 33 fig.1.4 (reporting a ten percent decline between 1970 and 2000 in the percentage of the workforce working a forty-hour work week, and explaining that, although the average work week remained stable, “[v]ariation around the average has increased, marking the emergence of both longer and shorter workweeks for different groups of workers”).

by demonstrating in a rigorous and compelling manner that a compressed work week can reduce work/family conflicts for many workers who are able to access such schedules. These observations merely suggest the potentially narrow group of workers for whom such results are likely to apply.⁶⁵

These limitations are predicted by the work of sociologists Jerry A. Jacobs and Kathleen Gerson, who have documented a “growing time divide” within the American labor force.⁶⁶ Since 1970, the forty-hour work week has become increasingly less typical for both women and men,⁶⁷ as occupations have become increasingly divided between “jobs that demand excessively long days and jobs that provide neither sufficient time nor money to meet workers’ needs.”⁶⁸ This bifurcation of working hours has both gender and class effects.⁶⁹ Low-hour, part-time jobs are held predominantly by women, while long-hour, full-time jobs are held predominantly by men.⁷⁰ The relatively small group of women who are laboring at the long end of the time divide, typically as managers or professionals, often experience high levels of work/family conflict as a result of workplace norms that demand extremely long hours.⁷¹ The larger group of women who are laboring at the short end of the time divide also frequently experience high levels of work/family conflict, often as the result of unpredictable schedules, number of hours, and income.⁷² This

⁶⁵ See Facer & Wadsworth, *Alternative Work Schedules*, *supra* note 12, at 176 (acknowledging that their study is “of a limited group,” and encouraging additional research).

⁶⁶ See JACOBS & GERSON, *supra* note 5, at 5, 36, 60, 63 (analyzing the results of a national survey in the 1990s of over 3000 workers); see also Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in *PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* 131, 132 (Judy Fudge & Rosemary Owen eds., 2006) (describing the growing bifurcation of working hours).

⁶⁷ JACOBS & GERSON, *supra* note 5, at 32–33, 33 fig.1.4.

⁶⁸ *Id.* at 8.

⁶⁹ See Michelle A. Travis, *The Future of Work-Family Policy: Is “Choice” the Right Choice?*, 13 EMP. RTS. & EMP. POL’Y J. 385, 403–14 (2009) [hereinafter Travis, *Work-Family Policy*]; see also JOAN C. WILLIAMS ET AL., CTR. FOR WORKLIFE LAW, “OPT OUT” OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT 29 (2006), available at http://www.uchastings.edu/site_files/WLL/OptOutPushedOut.pdf.

⁷⁰ See JACOBS & GERSON, *supra* note 5, at 33 fig.1.4, 34 tbl.1.2, 35. In 2000, over twenty-six percent of men in the U.S. were working fifty or more hours per week, while less than nine percent were working less than thirty hours per week. *Id.* During the same year, less than twelve percent of women were working fifty or more hours per week, while nearly twenty percent were working thirty hours or less. *Id.*

⁷¹ See WILLIAMS ET AL., *supra* note 69, at 29–31; Travis, *Work-Family Policy*, *supra* note 69, at 405–06.

⁷² See Ronald E. Bulanda & Stephen Lippmann, *Wrinkles in Parental Time with Children: Work, Family Structure, and Gender*, 13 MICH. FAM. REV. 5, 10–12 (2009) (explaining how the “resurgence of irregular and unpredictable nonstandard work shifts,” which are typically involuntary for low-income workers, contributes to severe work/family conflicts for workers in low-income jobs); Posting of Liz Watson & Jessica Glenn to Work and Family Blog, <http://wfnetwork.bc.edu/blog/flexible-work-arrangements-improving-job-quality-and-workforce-stability-for-low-wage-workers-and-their-employers> (Sept. 7, 2009) (explaining that low-income workers often face acute work/family conflicts because they are “more likely to face involuntary part-time work, rigid or unpredictable

group of low-income women frequently faces even more rigid workplace environments than high-income women, often risking severe job consequences or job loss for even minor schedule breaches due to caregiving obligations.⁷³

Evidence suggests that this growing bifurcation of jobs into long-hour and short-hour positions is not a straightforward reflection of workers' preferences,⁷⁴ as a growing majority of workers report a mismatch between their actual and ideal working hours.⁷⁵ The growing group of workers at the high end of the time divide typically would prefer to work less, while the growing group of workers at the low end of the time divide frequently would prefer to work more.⁷⁶ Workers who are unhappy with their number

schedules, or night, evening and weekend work," as well as "unstable income and job loss"). See also generally JOAN C. WILLIAMS, CTR. FOR WORKLIFE LAW, ONE SICK CHILD AWAY FROM BEING FIRED: WHEN "OPTING OUT" IS NOT AN OPTION (2006) [hereinafter WILLIAMS, ONE SICK CHILD], available at <http://www.worklifelaw.org/pubs/onesickchild.pdf> (describing the unique aspects of low-income jobs that contribute to severe work/family conflicts).

⁷³ See WILLIAMS ET AL., *supra* note 69, at 35–36; WILLIAMS, ONE SICK CHILD, *supra* note 72, at 3, 8–14; see also JACOBS & GERSON, *supra* note 5, at 104 (finding from survey results that white-collar workers have more job flexibility and control over their work schedules than blue-collar workers); Liechty & Anderson, *supra* note 1, at 313 (noting that "professionals are more likely to have access to voluntary flexible work schedules than lower wage employees," that "many low-income families endure highly complex, time-pressed lives in order to survive," and that "the families who are most economically stressed are often the ones whose jobs offer the least flexibility or security in the face of family needs"); Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 DUKE J. GENDER L. & POL'Y 7, 13–17 (2006) (explaining the reasons why, "[d]espite their longer hours, professional workers often have the most flexibility and control over their work time"). In general, "most flexible work options are contingent upon worker technological savvy and professional autonomy . . . which exclude most low-wage workers." Liechty & Anderson, *supra* note 1, at 313. Not only do women working short-hour, part-time positions face workplace rigidity, but they also face long-lasting decreases in occupational mobility, compensation, benefits, and promotion opportunities. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 96–100 (2000); WILLIAMS ET AL., *supra* note 69, at 30–31; Travis, *Work-Family Policy*, *supra* note 69, at 412. For additional, related commentary presented at this Symposium, see generally Shirley Lung, *The Four Day Work Week: But What About Ms. Coke, Ms. Upton, and Ms. Blankenship?*, 42 CONN. L. REV. 1119 (2010).

⁷⁴ See Travis, *Work-Family Policy*, *supra* note 69, at 412–14; see also JACOBS & GERSON, *supra* note 5, at 5 (concluding from a national survey of over 3000 workers in the 1990s that "workers' actual time at work does not necessarily reflect their desires").

⁷⁵ See JACOBS & GERSON, *supra* note 5, at 64 tbl.3.1, 65–67, 77 (reporting data from 1997 and concluding that "most American workers experience a significant gap between how much they work and how much they would like to work," and that this group is growing over time); WILLIAMS ET AL., *supra* note 69, at 30 (describing a national survey of 500 dual-career families in which sixty-five percent of women in full-time jobs reported wanting to work part-time). In a 1997 survey, only one-fifth of workers surveyed reported that their actual working hours matched their ideal working hours, while three-fifths reported that their actual hours were longer than their ideal, and one-fifth reported that their actual hours were shorter than their ideal. JACOBS & GERSON, *supra* note 5, at 64 tbl.3.1. These figures do not include the unemployed, who should be added to those who desire greater working hours. *Id.* at 64.

⁷⁶ See JACOBS & GERSON, *supra* note 5, at 5, 36, 60, 63 (drawing this conclusion from the results of a national survey of over 3000 workers during the 1990s); see also Schultz & Hoffman, *supra* note 66, at 132–33, 149 (advocating for an expanded supply of short-hour, full-time jobs). Because men are over-represented in long-hour jobs and women are over-represented in short-hour, part-time positions, "[t]he result is many fathers working longer hours than they would like and many mothers working fewer hours than they would like." WILLIAMS ET AL., *supra* note 69, at 3.

of working hours most frequently cite as “ideal” a job that would allow combining caregiving responsibilities with approximately thirty to forty hours of paid work per week.⁷⁷ While this aspiration unites workers across both gender and class lines,⁷⁸ it is becoming increasingly difficult to realize as fewer workers are able to regularly work close to forty hours per week.⁷⁹

This research suggests that the four-day work week will at best be a partial solution to the multi-faceted sources of work/family conflict. Despite its recent explosion, the use of a four-day work week is unlikely to become available either for workers whose jobs currently demand hours in excess of forty or fifty per week, or for workers whose jobs often provide variable hours that routinely fall below twenty per week. While a four-day work week may provide very real work/family benefits for the decreasing portion of the workforce that is currently laboring at or near a forty-hour work week, those workers tend to be among the group whose work/family conflicts are both the least acute and the most easily resolved. This explains why some work/family scholars have focused their sights on legal and policy initiatives for expanding the supply of high-quality, thirty-five to forty-hour jobs, rather than on increasing working time flexibility.⁸⁰

Even for workers who *are* able to gain access to a four-day work week, a closer look at the research raises doubts about the ability of the four-day work week to do more than just alleviate work/family pressures by compressing work hours and thereby freeing up larger blocks of time. That benefit is certainly important and produces measurable reductions in work/family conflict, as documented in the studies described above. A deeper analysis of the research, however, suggests that the four-day work week is unlikely to make meaningful inroads into the gendered division of labor that contributes so significantly to many women’s conflicting work and family demands. Even though both men and women were among the

⁷⁷ See JACOBS & GERSON, *supra* note 5, at 64–69; WILLIAMS ET AL., *supra* note 69, at 30; Travis, *Work-Family Policy*, *supra* note 69, at 412–13. In a very large 1997 survey, employees were categorized by their current number of working hours per week: employees working less than thirty hours; employees working thirty to thirty-nine hours; employees working forty to forty-nine hours; employees working fifty to fifty-nine hours; and employees working sixty or more hours. JACOBS & GERSON, *supra* note 5, at 66 fig.3.1. The average number of hours reported as “ideal” within each of these categories was strikingly similar, regardless of gender. *Id.* Male workers’ “ideal” ranged from approximately thirty-two to forty-two hours per week, while female workers’ “ideal” ranged from approximately twenty-seven to forty-one hours per week. *Id.*

⁷⁸ See JACOBS & GERSON, *supra* note 5, at 78; Travis, *Work-Family Policy*, *supra* note 69, at 412–13.

⁷⁹ See JACOBS & GERSON, *supra* note 5, at 77; see also WILLIAMS ET AL., *supra* note 69, at 30 (emphasizing the “inability to find good jobs requiring 30 to 40 hours per week,” and noting that “[t]he United States has relatively few good, 35 to 40 hour per week jobs”). One study has found that among employed workers between the ages of twenty-five and fifty, only three percent of men and less than nine percent of women work between thirty-five and forty hours per week. See WILLIAMS ET AL., *supra* note 69, at 30.

⁸⁰ See generally Schultz & Hoffman, *supra* note 66; see also Travis, *Work-Family Policy*, *supra* note 69, at 412–25.

high percentages of workers who provided generally positive responses about the impact of compressed work schedules on work/family balance, the four-day work week may not be moving women much closer to achieving equality.⁸¹

In the Gilbert and Vega study of patrol officers, for example, actual work/family benefits may not be reflected simply by the fact that, when specifically asked to rate the degree to which a compressed schedule affected their ability to devote time to family members, 85.3% of the nearly all-male respondents reported that it had made it “‘easier’ or ‘much easier’” to do so.⁸² When the patrol officers were asked in an open-ended question to identify what they found to be the *most* favorable aspect of the compressed work week, 88.3% said that it gave them a greater opportunity to participate in off-duty employment—in other words, that a compressed work week allowed them to take a second paid job.⁸³ To the extent that male workers use the scheduling flexibility of a compressed work week to take on additional paid work, rather than to share a greater proportion of family caregiving, a critical component of many women’s work/family conflicts will remain unaddressed.

A detailed assessment of the earlier 1970 study of four-day workers at thirteen different firms, which is described above, raises similar concerns. Although seventy-five percent of the workers surveyed reported spending more time with their families when working a four-day rather than a five-day work week, the study also found that the four-day work week “contributes significantly to moonlighting,” particularly for men.⁸⁴ The percentage of respondents who reported holding a second job quadrupled from four percent when working a five-day work week to seventeen percent after moving to a compressed four-day schedule.⁸⁵ The researchers believe that these percentages likely under-report the actual level of moonlighting, based on worker responses to interview questions regarding co-worker behavior and the fact that many of the employers had an express policy of firing workers for taking a second job.⁸⁶

⁸¹ For reflections on the issue of gender equality in the context of the four-day work week appearing in this Symposium Issue, see generally Vicki Schultz, *Feminism and Workplace Flexibility*, 42 CONN. L. REV. 1203 (2010).

⁸² Vega & Gilbert, *supra* note 27, at 394–95. The respondents were ninety-seven percent male, which reflected the demographics of the patrol division at that time. *Id.* at 394.

⁸³ *Id.* at 395. During the first year that the patrol officers worked the three-day, forty-hour schedule, they reported performing a similar number of hours on off-duty jobs as in the prior year while working a traditional five-day, forty-hour schedule. *Id.* at 400. Thus, it is unclear whether the perceived opportunity to increase paid work actually translated into increased participation in the paid labor market, at least in the period immediately following implementation of the three-day schedule.

⁸⁴ See Steele & Poor, *supra* note 31, at 105, 110, 115.

⁸⁵ *Id.* at 105, 109–10. The percentage of workers in the study who reported holding a second job while working a five-day work week was similar to the percentage of second job holders in the American labor force generally, which at the time of the study was five percent. *Id.*

⁸⁶ *Id.*

Most importantly, the study found that although the increase in moonlighting existed for both women and men, it was more pronounced with men. Twenty percent of the male respondents, but only ten percent of the female respondents, reported engaging in additional paid work after moving to the four-day work week.⁸⁷ Conversely, when respondents were asked in an open-ended question to name the advantages of working a four-day work week, some of the women—but none of the men—said that the four-day work week gave them an extra day to perform housework.⁸⁸ Similarly, among the respondents who had started work at their firms after the four-day work week was already in place, some of the women—but none of the men—said that they chose the job because the four-day work week gave them more time to devote to housework and family.⁸⁹ While these data do not negate the fact that the majority of both women and men found that the four-day work week enabled increased time with family, the findings do suggest that the four-day work week is unlikely to move workers much closer to a dual-earner, dual-carer model, which many work/family advocates believe is critical to achieving gender equality.⁹⁰

Of course, for low-income families, the ability of a compressed work week to allow workers, particularly men, to work a second paid job may be more important than equalizing the gendered division of labor, to the extent that insufficient family income is itself a major source of work/family stress. In the Vega and Gilbert study, for example, many of the patrol officers viewed the compressed work week as providing an important opportunity to supplement their low salaries.⁹¹ Nevertheless, this research provides a more nuanced understanding of the particular ways in which the four-day work week can and cannot address the variety of sources that contribute to work/family conflict.

These findings regarding compressed work schedules are consistent with results from the Bohen and Viveros-Long study, described above, on the effects of flextime in federal agencies under the AWSA. One of the study's objectives was "to see if husbands and wives divided family work more equally in their families when one spouse had a flexitime option."⁹² The researchers found that flextime "does not appear to encourage men to share home chores or child rearing with their wives," as the male workers reported engaging in the same percent of the family's domestic work,

⁸⁷ *Id.* at 105, 110.

⁸⁸ *Id.* at 105, 111.

⁸⁹ *Id.* at 108.

⁹⁰ See JANET C. GORNICK & MARCIA K. MEYERS, FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT 85–86 (2003).

⁹¹ See Vega & Gilbert, *supra* note 27, at 395.

⁹² BOHEN & VIVEROS-LONG, *supra* note 39, at 135.

whether they were on a flextime or a traditional schedule.⁹³

Thus, as a whole, the research that attempts either to identify the workers most likely to benefit from a four-day work week or to assess the actual behavioral changes that a four-day work week is likely to produce should temper the initial enthusiasm that a four-day work week might otherwise engender among work/family advocates. While this research raises serious questions about the extent to which a four-day work week is likely to assist those most in need, there is one particular group of workers for whom a four-day work week holds very real promise for ameliorating acute work/family conflicts. This group is made up of shift workers who regularly perform some or all of their work outside of normal business hours.⁹⁴

Many studies have found that shift workers—even those working at or near forty hours per week—frequently experience both harmful health effects and high levels of work/family conflict.⁹⁵ Many shift workers, particularly in the healthcare, police services, manufacturing, and energy industries, find the negative effects from working asocial hours compounded by highly unstable schedules on rotating, variable, or irregular shifts.⁹⁶ Because shift workers often work forty-hour work weeks—albeit forty highly undesirable hours each week—their jobs have provided a useful laboratory for experimenting with compressed work schedules. A large set of studies has found that many shift workers experience meaningful improvements in their ability to balance work and family by transitioning to various forms of compressed work weeks.⁹⁷ This is particularly the case when the compressed work schedule not only frees up additional days where no work is performed, but also regularizes working hours.⁹⁸

Although the research on shift workers is very encouraging, the potentially limited population of workers whose severe work/family conflicts are likely to be addressed through a four-day work week might

⁹³ See *id.* at 135, 137; see also Liechty & Anderson, *supra* note 1, at 306–07 (describing the Bohen and Viveros-Long study and concluding that flextime was “insufficient to . . . alter household labor equity for those women who already had a high level of objective family-work conflicts and stressors to manage”).

⁹⁴ See Bambra et al., *supra* note 34, at 765.

⁹⁵ See *id.* at 764; Jennifer A. Warren & Phyllis J. Johnson, *The Impact of Workplace Support on Work-Family Role Strain*, 44 FAM. REL. 163, 164 (1995).

⁹⁶ See Bambra et al., *supra* note 34, at 766 (describing the industries most likely to employ shift workers); Liechty & Anderson, *supra* note 1, at 313 (noting that “‘forced flexibility’ such as nonstandard, shift, or rotating work hours is associated with low wages, poor job security, and health risks”); Warren & Johnson, *supra* note 95, at 164 (finding an association between irregular and variable shifts and high levels of work/family conflict).

⁹⁷ See Bambra et al., *supra* note 34, at 766, 768–73 (conducting a meta-analysis of forty studies of the effect that a compressed work week has on the work/family balance of shift-workers and concluding that the majority of studies found improved work/family balance after the compressed work week was introduced).

⁹⁸ See *id.* at 764–73.

lead work/family advocates to prioritize other policy initiatives. A unique confluence of other concerns, however, including the economic crisis, environmental pressures to reduce oil consumption and greenhouse gas emissions, and increasing commute times, have all contributed to an immediate focus on expanding and experimenting with four-day work weeks and other compressed schedule designs. Work/family advocates should not miss this opportunity to play an active role in shaping the debate over the use, design, and potential legal regulation of the four-day work week to maximize its effectiveness as a work/family balance tool. The research on shift workers provides some initial insight into at least one important design criteria by highlighting the significance of scheduling predictability. Other research additionally has documented the importance of voluntary participation and worker control in ensuring that flexible work schedules are indeed “family-friendly.”⁹⁹ Part III considers how potential legal regulation of the four-day work week might best incorporate these insights, as well as considering what lessons existing regulation in this context might reveal about regulatory reform efforts around workplace flexibility more generally.

III. A COLLECTIVE REFLEXIVE APPROACH TO REGULATING THE FOUR-DAY WORK WEEK

Work/family discourse about the legal regulation of workplace flexibility has focused primarily on three general approaches. This section briefly summarizes those approaches and considers how they might apply in the context of the four-day work week. This section then highlights an under-developed variant of one of those approaches and considers what it might offer to work/family advocates who are interested in finding regulatory methods to maximize the effectiveness of compressed work schedules as a work/family balance tool.

The first general approach for regulating workplace flexibility is a traditional “command-and-control” strategy that relies on prescriptive rules with sanctions for non-compliance.¹⁰⁰ This form of “top-down” regulation is typically outcomes-oriented, often focusing on expanding substantive

⁹⁹ See Liechty & Anderson, *supra* note 1, at 313.

¹⁰⁰ See Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 64 (describing this as a “proscriptive rule-oriented” approach to regulating employer conduct); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 328 (2005) (describing this approach as relying on the “enactment and centralized enforcement of uniform rules and standards”); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 475 (2001) (describing this as a “rule-enforcement approach” that “treats regulation as punishing violations of predefined legal rules”).

rights and responsibilities.¹⁰¹ Reasonable accommodation mandates are one example of this approach.¹⁰²

The use of top-down substantive legal rules has been criticized on a variety of grounds.¹⁰³ Many commentators describe this type of regulatory strategy as a “one-size-fits-all” approach that fails to recognize not only the diverse interests of stakeholders (e.g., the heterogeneous needs of workers with caregiving responsibilities),¹⁰⁴ but also fails to recognize the validity of private economic concerns.¹⁰⁵ Commentators have been particularly skeptical about the ability of top-down regulatory methods to address subtle structural and organizational sources of gender discrimination in the workplace, including inflexible schedules and other working time norms. Specifically, scholars have highlighted the difficulty of crafting substantive rules that are appropriately responsive to complex workplace dynamics and relationships,¹⁰⁶ the risk of judicial capture of substantive mandates,¹⁰⁷ and the inability of command-and-control regulations to stimulate viable,

¹⁰¹ See Lobel, *supra* note 11, at 344–45; see also Arnow-Richman, *supra* note 100, at 28–29 (distinguishing traditional proposals for regulating workplace flexibility by expanding substantive rights from alternative process-based approaches); Simon Deakin & Colm McLaughlin, *The Regulation of Women's Pay: From Individual Rights to Reflexive Law?*, in WOMEN AND EMPLOYMENT: CHANGING LIVES AND NEW CHALLENGES 313, 319–20 (Jacqueline Scott et al. eds., 2008) (describing command-and-control approaches as “prescriptive” and outcomes-oriented, in contrast to “reflexive” regulation that is process-based and “validates a range of potential solutions”).

¹⁰² See Arnow-Richman, *supra* note 100, at 28, 45.

¹⁰³ See Estlund, *supra* note 100, at 340–41.

¹⁰⁴ See Lobel, *supra* note 11, at 380–81; see also Arnow-Richman, *supra* note 100, at 29–30, 45 (arguing that procedural legal mandates may “achieve individually tailored solutions that may in some instances prove superior to what could be achieved under externally imposed substantive mandates,” which often lack the ability “to address the divergent needs and circumstances of all caregivers”).

¹⁰⁵ See Lobel, *supra* note 11, at 379–80; see also Arnow-Richman, *supra* note 100, at 43–44 (questioning “the normative basis for placing additional responsibilities on employers”).

¹⁰⁶ See, e.g., Arnow-Richman, *supra* note 100, at 36–42, 65 (analyzing the limits of re-interpreting antidiscrimination mandates as a means of increasing workplace flexibility for caregivers and concluding that “[i]t is extraordinarily difficult to envision an appropriately responsive method of direct regulation” to address second-generation workplace exclusion); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 661 (2003) (arguing that “the contextual nature of the problem of modern workplace discrimination requires a similarly contextualized solution,” and that “[t]here simply is no single answer that will work in all organizations to eliminate institutionalized forms of discrimination”); Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 629 (2005) [hereinafter Green, *Work Culture*] (arguing that “discriminatory work cultures are too complex and too intertwined with valuable social relations to be easily regulated through judicial pronouncements and direct regulation”); Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HAST. L.J. 1435, 1436, 1454–56 (2008) (describing how traditional antidiscrimination mandates may inhibit employers’ ability to address “relational sources of discrimination”); Sturm, *supra* note 100, at 475 (explaining why the complexity, subtlety, and contextualized nature of “second generation” workplace discrimination “cannot be reduced to a fixed code of specific rules or commands”).

¹⁰⁷ See, e.g., Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 485–87 (2000); see also Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 21–46 (2005) [hereinafter Travis, *Recapturing*] (describing the process of judicial capture of the Americans with Disabilities Act’s reasonable accommodation mandate and of Title VII’s disparate impact theory).

individually-tailored solutions.¹⁰⁸ In addition, because traditional substantive rule making “presupposes an adversarial relationship between worker and employer,” this approach often encourages employers to focus on short-term strategies for avoiding liability rather than on engaging in creative problem solving to address the structural and organizational sources of work/family conflict.¹⁰⁹ As a result, top-down regulatory strategies are unlikely to engender in employers the necessary commitment to social change upon which a work/family agenda ultimately depends.¹¹⁰

The second general approach to increasing workplace flexibility lies at the other end of the spectrum from command-and-control strategies. This is the market-based governance approach, which relies not on legal intervention, but on making the market work more efficiently as a laboratory for workplace flexibility.¹¹¹ This approach often focuses on making the business case for workplace flexibility and maximizing information exchange to facilitate employers’ voluntary experimentation with working time innovation.¹¹² This approach is being used by organizations such as the Project for Attorney Retention, A Better Balance, and others, which disseminate research, provide training, and conduct outreach to educate employers about how flexible hour arrangements may produce financial benefits through reduced turnover, increased productivity, lower absenteeism, and enhanced recruiting.¹¹³

In the context of the four-day work week, this market-based approach is illustrated by the “Diversity & Flexibility Connection” initiative recently undertaken by a dozen major corporations seeking greater diversity among

¹⁰⁸ See Arnow-Richman, *supra* note 100, at 29.

¹⁰⁹ See *id.* at 67; see also Sturm, *supra* note 100, at 475–76 (observing that top-down regulation “induces firms to adopt strategies that reduce the short-term risk of legal exposure rather than strategies that address the underlying problem”).

¹¹⁰ See Arnow-Richman, *supra* note 100, at 29.

¹¹¹ See Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men and Responsibility*, 4 U. ST. THOMAS L.J. 573, 574, 582–85 (2007) (describing the market-based governance approach).

¹¹² See *id.*; see also WILLIAMS, UNBENDING GENDER, *supra* note 73, at 88–93 (describing evidence of the business case for increased workplace flexibility); Travis, *Recapturing*, *supra* note 107, at 12 (summarizing evidence of the potential financial benefits from workplace flexibility).

¹¹³ Information about the Project for Attorney Retention is available at <http://www.pardc.org/>, which includes links to various reports and best practice guides for employers to implement cost-effective flexible-hour and reduced-hour policies. Specific examples of attempts to use the business case for flexibility as a way to alter employers’ behavior are readily available online. See, e.g., ANNA DANZIGER & SHELLEY WATERS, WORKPLACE FLEXIBILITY 2010, THE BUSINESS CASE FOR FLEXIBLE WORK ARRANGEMENTS 1–2 (2008), available at <http://www.law.georgetown.edu/workplaceflexibility2010/definition/documents/BusinessCaseforFWAs.pdf>; DANA E. FRIEDMAN, FAMILIES & WORK INST., WORKPLACE FLEXIBILITY: A GUIDE FOR COMPANIES 1–5, available at <http://www.familiesandwork.org/3w/tips/downloads/companies.pdf>; JENNIFER E. SWANBERG ET AL., CITISALES STUDY ISSUE BRIEF NO. 3, CAN BUSINESS BENEFIT BY PROVIDING WORKPLACE FLEXIBILITY TO HOURLY WORKERS? 1–6, available at http://www.citisalesstudy.com/_pdfs/IB3-HourlyWorkers.pdf; A Better Balance, Fact Sheet: The Business Case for Workplace Flexibility, http://abetterbalance.org/cms/index2.php?option=com_docman&task=doc_view&gid=24&Itemid=99999999 (last visited Apr. 6, 2010).

the attorneys employed by their outside law firms.¹¹⁴ These corporations voluntarily began to demand that their outside law firms demonstrate a commitment to flexible work policies, often by including on their legal accounts at least one part-time attorney (often someone on a four-day work week), as a condition for securing their legal business.¹¹⁵ In addition to directing their business to law firms that are committed to workplace flexibility, the companies' general counsel have been educating law firms about the costs that clients incur from attorney attrition caused by a long-hour work culture that expects employees to be available seven days per week.¹¹⁶

Although many work/family advocates have been focusing increased attention on these types of educational campaigns, commentators have widely criticized reliance on *purely* market-based approaches to address employees' work/family conflicts.¹¹⁷ Most scholars view the market as insufficient, on its own, to achieve meaningful progress toward workplace justice, equality, or flexibility, due to imperfect information, the effects of cognitive biases, and other sources of market inefficiencies.¹¹⁸ Scholars have identified a variety of reasons why employers may not respond to the growing evidence of a link between workplace flexibility and business efficiency.¹¹⁹ For example, many firms lack the necessary "organizational systems" that would allow them to identify the ways in which workplace flexibility might produce financial gains, either at the workplace level or on an individual employee basis.¹²⁰ These structural and procedural deficiencies in obtaining relevant information are exacerbated by most employers' focus on short-term cost-benefit measures, rather than on measures of long-term economic and productivity gains.¹²¹ In addition, there are some situations in which work/family objectives and efficiency simply conflict and external legal regulation is therefore necessary to

¹¹⁴ See Karen Sloan, *Companies Push for Flexible Schedules To Boost Women Attorneys*, LAW.COM, Dec. 3, 2009, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202436003132>.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See Arnow-Richman, *supra* note 100, at 67.

¹¹⁸ See, e.g., Sturm, *supra* note 100, at 478.

¹¹⁹ See, e.g., Arnow-Richman, *supra* note 100, at 55, 67–68 (explaining why synergies between family-friendly workplace practices and economic business interests "are not likely to be achieved wholly through market forces"); Travis, *Recapturing*, *supra* note 107, at 9–21 (analyzing the role of cognitive bias in employment decision making to help "explain why data revealing the economic benefits of flexible work arrangements have not produced significant changes by presumably economically efficient employers").

¹²⁰ See Sturm, *supra* note 100, at 478; see also Arnow-Richman, *supra* note 100, at 55, 67–68 (explaining that a "necessary precondition" for employers to recognize potential financial gains from workplace flexibility "is the creation of a safe forum in which to identify and explore change," and in which an employer and an employee "can educate each other through an objective process").

¹²¹ See Sturm, *supra* note 100, at 478; see also Travis, *Recapturing*, *supra* note 107, at 89 (noting the importance of focusing on long-term cost-benefit analysis when assessing the economic gains that employers might realize from workplace accommodations).

ensure that workers with caregiving responsibilities are not discriminated against or excluded in the pursuit of rational economic objectives.¹²²

In between these two primary approaches to addressing workplace flexibility—either through top-down rule making or market-based methods—lies the “new governance” approach, which instead emphasizes public oversight of private, regulatory initiatives.¹²³ The new governance approach often relies on various forms of “reflexive law,” which focus on imposing procedural rather than substantive obligations to facilitate business self-regulation.¹²⁴ The new governance scholars have made a compelling case that this middle-ground approach may provide a viable solution to the shortcomings of both top-down substantive rules and of imperfect market mechanisms by recognizing that “economic efficiency and democratic legitimacy can be mutually reinforcing.”¹²⁵

Several examples of new governance strategies come from the United Kingdom, which has been a leader in experimenting with reflexive legal regulation in the workplace. One example is a U.K. Code of Practice that gives individual employees the right to request certain information from their employers to help them assess their relative compensation when they believe that they may be experiencing sex-based pay discrimination.¹²⁶

¹²² See Sturm, *supra* note 100, at 478; see also Arnow-Richman, *supra* note 100, at 67 (suggesting that “the business case for flexible and other employee-friendly management practices may be somewhat overstated”); Selmi, *supra* note 111, at 583–85 (arguing that “there are very little reliable data to support the productivity benefits of flexible workplaces,” and that advocates have inadequately explained “why more employers have not adopted flexible workplace practices” if they are indeed “efficient”).

¹²³ See Arnow-Richman, *supra* note 100, at 63–74; Lobel, *supra* note 11, at 344–45; see also Estlund, *supra* note 100, at 377–83 (proposing a system of monitored employer self-regulation as an alternative to top-down enforcement of labor standards); Green, *Work Culture*, *supra* note 106, at 627–29, 664–83 (proposing a set of “legal incentives that will facilitate contextual problem solving by employers” as a more effective way to regulate discriminatory work cultures than relying “on courts to articulate and enforce specific, across-the-board rules”); Sturm, *supra* note 100, at 553–67 (proposing regulatory reforms that focus on incentivizing employers to voluntarily adopt structural problem-solving methods to address workplace discrimination).

¹²⁴ See Deakin & McLaughlin, *supra* note 101, at 313–14, 319–20; Lobel, *supra* note 11, at 345; see also Michelle A. Travis, *Employment Protection for Atypical Workers: Proceedings of the 2006 Annual Meeting, Association of American Law Schools Section on Labor Relations and Employment Law*, 10 EMP. RTS. & EMP. POL’Y J. 233, 266–69 (2006) [hereinafter Travis, *Atypical Workers*] (describing the “shift in codifying rights in terms of process, rather than substantive outcomes”); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans With Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 356 n.273 (2009) [hereinafter Travis, *Lashing Back*] (noting “the recent scholarly trend to promote the value of process-based solutions for reducing employment discrimination and advancing worker rights”); Travis, *Work-Family Policy*, *supra* note 69, at 425–29 (considering the role that reflexive law might play in a work/family policy agenda).

¹²⁵ Lobel, *supra* note 11, at 344. See also Arnow-Richman, *supra* note 100, at 67 (describing procedural mandates as “a possible middle ground” that might address “the dichotomous tension between substantive regulation and deregulated markets”).

¹²⁶ See Deakin & McLaughlin, *supra* note 101, at 317–18 (describing the Code of Practice on Equal Pay, issued by the United Kingdom’s Equal Opportunities Commission in 2003 to help ensure compliance with laws prohibiting sex-based compensation discrimination); see also generally EQUAL OPPORTUNITIES COMMISSION, CODE OF PRACTICE ON EQUAL PAY, available at <http://www.equality>

While providing no new substantive entitlements, this procedural right enables an individual employee to obtain—and an employer to pay appropriate attention to—relevant information about workplace inequalities.

More relevant to the four-day work week is the United Kingdom's Employment Act of 2002¹²⁷ and its related Flexible Working Regulations¹²⁸ (collectively, the "U.K. Employment Act"). The U.K. Employment Act grants certain employees the right to request a change in the number of hours, times, or days in their work schedule,¹²⁹ and it prohibits employers from retaliating against employees for making such a request.¹³⁰ This law would protect, for example, an employee who asks for a four-day work week schedule. This "right to request" does not entitle employees to any particular outcome regarding their working hours. Instead, it establishes a mandatory procedure ensuring that the employer will meaningfully consider the employee's request.¹³¹

Under the U.K. Employment Act, an employee must initiate the process by filing with an employer a detailed written request for a specific alternative work schedule that addresses, among other things, how to mitigate any anticipated effects that the proposed schedule might have on

humanrights.com/uploaded_files/code_of_practice_equalpay.pdf. While the Code of Practice on Equal Pay is not binding law, an employer's failure to comply with its provisions is admissible evidence before a legal tribunal in cases alleging sex-based compensation discrimination. See CODE OF PRACTICE ON EQUAL PAY, *supra*, at 2, ¶3. The Code provides that "[a] woman is entitled to write to her employer asking for information that will help her establish whether she has received equal pay and if not, what the reasons for the pay difference are." *Id.* at 9, ¶37. The government has provided a standard form, known as "The Equal Pay Questionnaire," which an employee may use for this purpose either before filing a legal claim or within twenty-one days after filing. *Id.* If an employer fails to respond to the request within eight weeks (without a reasonable excuse), or if an employer provides "an evasive or equivocal reply," a legal tribunal may infer that the employer has no legitimate basis for an identified pay difference. See *id.* at 9, ¶38.

¹²⁷ Employment Act, 2002, c. 22, § 47 (U.K.) (adding § 8A to the Employment Rights Act, 1996, c. 18 (U.K.)).

¹²⁸ The Flexible Working (Eligibility, Complaints and Remedies) Regulations, 2002, S.I. 2002/3236 (U.K.); The Flexible Working (Procedural Requirements) Regulations, 2002, S.I. 2002/3207 (U.K.).

¹²⁹ Employment Rights Act, 1996, c. 18, § 80F(1) (U.K.) (as amended by the Employment Act, 2002, c. 22, § 47 (U.K.)). Eligible employees include those who have worked for their employer continuously for twenty-six weeks and who have a child under age six or a disabled child under age eighteen, or who are providing care for an adult relative. Equality and Human Rights Commission, Family Friendly Working: What the Law Says, <http://www.equalityhumanrights.com/your-rights/gender/sex-discrimination-your-rights-at-work/family-friendly-working/family-friendly-working-what-the-law-says/> (last visited Apr. 11, 2010).

¹³⁰ The Flexible Working (Procedural Requirements) Regulations, 2002, S.I. 2002/3207, art. 16 (U.K.).

¹³¹ See Arnow-Richman, *supra* note 100, at 75–78 (describing the U.K. Employment Act to illustrate process-based regulation that does not obligate an employer to adopt any particular work schedule, but instead requires the employer to "seriously consider the request"); Travis, *Atypical Workers*, *supra* note 124, at 266–68 (describing the U.K. Employment Act as an example of process-based regulation to initiate meaningful consideration of workplace flexibility requests).

the employer's operations.¹³² An employer must respond to an employee's request for a four-day work week or other alternative work schedule within twenty-eight days, either by granting the request or by setting up an individual meeting with the employee to discuss the request.¹³³ The employer must notify the employee of its final decision within fourteen days of the meeting.¹³⁴ If the employer denies the employee's request, it must provide a written response that identifies one or more reasons for the denial from a specific list of business-related grounds enumerated in the Act.¹³⁵ The enumerated reasons include, among others, that the employee's request would make the employer unable to meet customer demands, or that there would be insufficient work available during the hours that the employee wants to work.¹³⁶

Within fourteen days of receiving the employer's final response, an employee may file an internal appeal with the employer seeking review of a denial.¹³⁷ The employer must meet with the employee to discuss the appeal and must provide a written response to the appeal within fourteen days of that meeting.¹³⁸ The employee then may appeal an employer's denial to an outside tribunal, but only on very limited grounds.¹³⁹ The outside tribunal will defer to the employer's business judgment and will assess only whether the employer followed the statutory procedure, whether the employer's basis for denying the employee's request included at least one of the statutorily-enumerated reasons, and whether the employer's denial was based on erroneous facts.¹⁴⁰

¹³² Employment Rights Act, 1996, c. 18, § 80F(2) (U.K.) (as amended by the Employment Act, 2002, c. 22, § 47 (U.K.)). See also Arnow-Richman, *supra* note 100, at 76–77 (describing the information that an employee must include in a request for an alternative work schedule under the U.K. Employment Act).

¹³³ Employment Rights Act, 1996, c. 18, § 80G(2)(a) (U.K.) (as amended by the Employment Act, 2002, c. 22, § 47 (U.K.)); The Flexible Working (Procedural Requirements) Regulations, 2002, S.I. 2002/3207, art. 3 (U.K.).

¹³⁴ Employment Rights Act, 1996, c. 18, § 80G(2)(b) (U.K.) (as amended by the Employment Act, 2002, c. 22, § 47 (U.K.)); The Flexible Working (Procedural Requirements) Regulations, 2002, S.I. 2002/3207, art. 4 (U.K.).

¹³⁵ Employment Rights Act, 1996, c. 18, § 80G(2)(c) (U.K.) (as amended by the Employment Act, 2002, c. 22, § 47 (U.K.)); The Flexible Working (Procedural Requirements) Regulations, 2002, S.I. 2002/3207, art. 5 (U.K.).

¹³⁶ Employment Rights Act, 1996, c. 18, § 80G(1)(b) (U.K.) (as amended by the Employment Act, 2002, c. 22, § 47 (U.K.)).

¹³⁷ *Id.* § 80G(2)(d); The Flexible Working (Procedural Requirements) Regulations, 2002, S.I. 2002/3207, art. 6 (U.K.).

¹³⁸ Employment Rights Act, 1996, c. 18, § 80G(2)(g)–(h) (U.K.) (as amended by the Employment Act, 2002, c. 22, § 47 (U.K.)); The Flexible Working (Procedural Requirements) Regulations, 2002, S.I. 2002/3207, arts. 8–10 (U.K.).

¹³⁹ Employment Rights Act, 1996, c. 18, § 80H(1) (U.K.) (as amended by the Employment Act, 2002, c. 22, § 47 (U.K.)); The Flexible Working (Procedural Requirements) Regulations, 2002, S.I. 2002/3207, art. 15 (U.K.).

¹⁴⁰ Employment Rights Act, 1996, c. 18, § 80H(1) (U.K.) (as amended by the Employment Act, 2002, c. 22, § 47 (U.K.)); The Flexible Working (Procedural Requirements) Regulations, 2002, S.I. 2002/3207, art. 15 (U.K.).

New governance scholars have praised the U.K. Employment Act as a useful model for how reflexive laws may help develop organizational practices to overcome the information deficiencies that render purely market-based mechanisms suspect.¹⁴¹ Nevertheless, work/family advocates who are familiar with the often deep institutional resistance to working time innovation rightfully may be skeptical of a law that imposes no substantive obligations on employers. The promise of the U.K. Employment Act, however, lies in its particular selection of steps governing the engagement of both sides in the process.¹⁴² Those steps are designed to help facilitate the exchange of relevant information to maximize the chances of identifying “mutually beneficial” solutions.¹⁴³ Unlike top-down regulatory methods, the U.K. Employment Act’s process-based approach at least has the potential to encourage jointly-designed, individually-tailored work schedules that are more responsive both to employees’ diverse work/family circumstances and to employers’ diverse business needs.¹⁴⁴

Preliminary studies on the U.K. Employment Act provide some reason for optimism.¹⁴⁵ Research indicates that the number of employee requests for alternative work schedules has increased since the law was enacted and that employers voluntarily approve the majority of requests made by eligible employees.¹⁴⁶ In addition, most employers report that compliance with the “right to request” procedures is not prohibitively costly.¹⁴⁷ The U.K. Employment Act thus provides a potentially useful model for work/family advocates when considering how legal regulation might be employed in the United States to maximize the work/family benefits of compressed work schedules.

One of the most important examples of a reflexive regulatory proposal in the United States is Professor Rachel Arnow-Richman’s thoughtful articulation of an “incentivized organizational justice model” for future

¹⁴¹ See Arnow-Richman, *supra* note 100, at 76; Travis, *Atypical Workers*, *supra* note 124, at 268.

¹⁴² See Arnow-Richman, *supra* note 100, at 76.

¹⁴³ See *id.* In this way, the U.K. Employment Act’s procedures are similar to the “interactive process” that is envisioned as part of employers’ compliance with the reasonable accommodation mandate in the Americans with Disabilities Act of 1990 (“ADA”). See *id.* at 50–56; see also Travis, *Lashing Back*, *supra* note 124, at 356–66 (describing how the ADA’s interactive process has stamped a “procedural footprint in the workplace,” which facilitates relevant information exchange that “may allow employers and employees to identify workplace modifications that will produce joint long-term benefits”); Michelle A. Travis, *Perceived Disabilities, Social Cognition, and “Innocent Mistakes,”* 55 VAND. L. REV. 481, 576–77 (2002) (explaining how the ADA’s interactive process may provide a “built-in laboratory” to help reduce cognitive biases that contribute to certain forms of workplace discrimination).

¹⁴⁴ See Arnow-Richman, *supra* note 100, at 78.

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

work/family legislation.¹⁴⁸ Rather than granting or expanding substantive accommodation rights to workers with caregiving responsibilities, Arnow-Richman's proposal would grant individual employees a new procedural right.¹⁴⁹ This right would obligate an employer to engage in a good faith interactive process to meaningfully discuss an employee's request for an alternative work schedule.¹⁵⁰ Unlike the U.K. Employment Act, this proposal would rely on a more flexible "good faith" responsibility, rather than mandating the specific content of the interactive process.¹⁵¹ An employer's failure to satisfy this responsibility would subject the employer to monetary penalties to ensure that the "procedural obligations provide meaningful incentives in their own right."¹⁵²

Professor Arnow-Richman suggests that one way to implement this general model would be to amend the Family and Medical Leave Act ("FMLA"), which currently grants covered employees at large employers the substantive right to job-protected unpaid leave for specifically-defined caregiving events.¹⁵³ While the FMLA does not generally require an employer to provide alternative work schedules, Arnow-Richman's proposal would obligate an employer to at least discuss such arrangements when an employee experiences a qualifying caregiving event and when the

¹⁴⁸ See *id.* at 27–29, 56–62. In this Symposium Issue, Professor Arnow-Richman further develops her proposal for using law to encourage and mediate employers' voluntary and individual accommodation efforts through statutory procedural rights that enable and protect caregivers who seek alternative work arrangements. See generally Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Family Balance*, 42 CONN. L. REV. 1081 (2010).

¹⁴⁹ See Arnow-Richman, *supra* note 100, at 27–29, 56–62.

¹⁵⁰ See *id.* at 56–62. This proposed obligation would be similar to the ADA's interactive process obligation except that it would add monetary penalties for an employer's failure to comply, regardless of the outcome on any underlying substantive claim. See *id.* at 56 (explaining that her proposal "adopts the ADA interactive process concept, but makes the threat of a procedural violation meaningful through the imposition of a statutory fee").

¹⁵¹ See *id.* at 76.

¹⁵² *Id.* at 54, 56–58.

¹⁵³ *Id.* at 30, 56–58. The FMLA covers employees who have worked for their employer for at least twelve months and 1250 hours during the prior twelve-month period, if the employer is engaged in commerce and has employed fifty or more employees for a specified time period. 29 U.S.C. § 2611(2)(A), 2611(4)(A) (2006). The FMLA provides such employees the right to unpaid, job-protected leaves for specified time periods for the birth, adoption, or foster care placement of a new child, to provide care for the serious health condition of an employee's spouse, child, or parent, to attend to an employee's own serious health condition, or to attend to specifically-defined needs of certain family members' military obligations. *Id.* §§ 2612(a), 2612(c), 2614(a). Professor Arnow-Richman's proposal also would include a second component, which is "a judicially created burden shift on proof of substantive violations of the FMLA and Title VII in cases where employers fail to engage in a good-faith process and the plaintiff can demonstrate a prima facie case of retaliation or discriminatory failure to accommodate." Arnow-Richman, *supra* note 100, at 56, 58–62. This would ensure not just monetary penalties for failure to meet the procedural obligations, but litigation penalties as well.

employee returns from a covered leave.¹⁵⁴ Although such an approach would retain the limited coverage of the FMLA, which excludes many employees, employers, and caregiving activities,¹⁵⁵ Arnow-Richman correctly observes that it may be a more politically viable first step in experimenting with reflexive regulation in the United States, rather than immediately seeking new legislation that would cover a broader group of caregivers, as in the United Kingdom.¹⁵⁶ Overall, Arnow-Richman's proposal is an extremely significant one for work/family advocates who are seeking to most effectively regulate workplace flexibility. Her proposal offers both the theoretical and practical foundation necessary to operationalize a reflexive law approach "to enhance worker voice and provide incentives for voluntary employer accommodation of caregiving."¹⁵⁷

While these existing reflexive law models within the new governance approach have much to offer work/family advocates who are considering regulation of the four-day work week, the existing models share one potential limitation: they depend upon the creation and exercise of *individual* employee rights. The existing models do not incorporate formal procedural mechanisms either for collective employee action or for collective information exchange between employers and relevant groups of employees within the workplace. The models instead rely upon individual employees to initiate and participate in the process. For these models to work, individual employees must be aware of and understand their procedural rights, be aware of and understand the legal remedies available to protect them when exercising their procedural rights, and perceive those legal remedies as sufficient to overcome concerns about employer retaliation.

¹⁵⁴ Arnow-Richman, *supra* note 100, at 56–57. Currently, the FMLA only requires that the mandated unpaid leave periods be provided on an intermittent or reduced leave basis in very narrow circumstances. See 29 U.S.C. § 2612(b).

¹⁵⁵ Many scholars have criticized the FMLA for its limited coverage on a variety of different grounds. See, e.g., Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 AM. U. J. GENDER SOC. POL'Y & L. 459, 468–81 (2008) (explaining how the FMLA's requirements have gender, class, and race effects); Naomi Gerstel & Amy Armenia, *Giving and Taking Family Leaves: Right or Privilege?*, 21 YALE J.L. & FEMINISM 161, 166–76 (2009) (demonstrating how the FMLA reinforces a family model primarily practiced by white, wealthy, heterosexual couples, and exacerbates inequalities based on marital status, sexuality, race, and class); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 419–26 (2001) (describing how the FMLA's coverage requirements, which are "premised upon the existence of the heterosexual, two-parent family," end up excluding all but "the most privileged workers"); Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 38–47 (2007) (explaining how the FMLA effectively excludes low-income workers from protection).

¹⁵⁶ See Arnow-Richman, *supra* note 100, at 57 n.142, 85–86; see also Travis, *Lashing Back*, *supra* note 124, at 355–66 (explaining how individual procedural rights for some employees can stamp a "procedural footprint in the workplace," which ends up benefiting other employees as well).

¹⁵⁷ Arnow-Richman, *supra* note 100, at 27.

Under the right circumstances, it is possible that individual process rights might indirectly facilitate collective employee action or collective information exchange within a workplace. Nothing in the existing models would prevent individual employees from sharing information about the employer that they receive through individual participation in the process.¹⁵⁸ Nor would the existing models prevent employers from aggregating information that they receive from individual employees. In addition, while Professor Arnow-Richman acknowledges that individual procedural rights are “hardly a substitute for traditional bargaining,” she also describes how such rights might at least create “a framework for collective action.”¹⁵⁹ The process of learning about a new individual right, and of naming and claiming such a right, can itself be a social endeavor that connects individual employees within a workplace in meaningful ways.¹⁶⁰ Arnow-Richman suggests that this process might help employees—as a group—begin questioning and delegitimizing unilateral employer acts, which eventually may encourage more explicitly concerted employee action.¹⁶¹

Some of the existing models of individual reflexive rights contain modest elements that might facilitate these potential collective effects. The U.K. Employment Act, for example, permits an individual employee to bring a trusted colleague to all of the meetings that the individual has with the employer to discuss the employee’s request for an alternative work schedule.¹⁶² The Act also requires that an individual employee’s initial proposal for an alternative work schedule contain certain information, which sometimes requires the employee to consult with co-workers.¹⁶³ Specifically, an employee’s initial written application must not only identify the employee’s desired work schedule, but also must address how to mitigate any anticipated affects that the proposed schedule might have on the employer’s operations.¹⁶⁴ If the proposed work schedule would affect co-workers, the Act contemplates that the individual employee might need to obtain feedback from those co-workers to address the operational impact component in the employee’s request.¹⁶⁵ While this requirement

¹⁵⁸ In the context of the ADA’s interactive process, several authors have explained how employees can benefit by sharing information that they receive from engaging in the process. *See, e.g.*, RUTH O’BRIEN, *BODIES IN REVOLT: GENDER, DISABILITY, AND A WORKPLACE ETHIC OF CARE* 113 (2005); Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 858 (2008); Travis, *Lashing Back*, *supra* note 124, at 366.

¹⁵⁹ Arnow-Richman, *supra* note 100, at 70.

¹⁶⁰ *See id.*

¹⁶¹ *See id.*

¹⁶² Employment Rights Act, 1996, c. 18, § 80G(2)(k) (U.K.) (as amended by the Employment Act, 2002, c. 22, § 47 (U.K.)); The Flexible Working (Procedural Requirements) Regulations, 2002, S.I. 2002/3207, art. 14 (U.K.).

¹⁶³ *See* Arnow-Richman, *supra* note 100, at 76–77.

¹⁶⁴ *See id.*

¹⁶⁵ *See id.* at 77.

thus might encourage discussions among employees, such detailed and challenging requirements for an employee to even initiate the process simultaneously highlight the risk that not all employees will be able to access individual-based process rights.¹⁶⁶

Despite some of the positive research results regarding individual employees' use of the U.K. Employment Act, more general research in the United Kingdom legitimates this concern by questioning the ability of individual reflexive laws to advance women's workplace equality. Based on empirical studies of the British experience, several researchers recently have concluded that reflexive regulation is unlikely to achieve gender equality goals unless unions or other employee organizations jointly manage the process that the reflexive law creates.¹⁶⁷ These researchers have concluded that one of the preconditions for individual reflexive laws to be effective is the existence of "bridging institutions," which they describe as extra-legal structures for employee representation and workplace deliberation.¹⁶⁸ These researchers emphasize the importance of having these deliberative mechanisms at the workplace level.¹⁶⁹ Because such institutional prerequisites currently do not exist in most workplaces in either the United Kingdom or the United States, these researchers remain skeptical about the potential ability of individual reflexive law strategies to advance workplace equality.¹⁷⁰

Professors Vicki Schultz and Allison Hoffman have reached a similar conclusion in their thoughtful work advocating for a reduced-hour work week.¹⁷¹ Schultz and Hoffman have identified a variety of legislative incentives, negotiated solutions, and private industry initiatives that might be used to help achieve that goal.¹⁷² Similar to the British researchers, Schultz and Hoffman have concluded that anything other than private industry initiatives would require the development of "a stronger structure to bolster representation of employees' interests for purpose of designing and enforcing corporate compliance."¹⁷³

This research highlights the need for work/family advocates to

¹⁶⁶ While setting a high standard for employees to initiate a workplace process is likely to constrict the availability of the right, it may also have some benefits, including that it effectively screens out "facially unreasonable requests," and that "it sets the stage for constructive discussion between the parties" by "treat[ing] the employee as having a stake in and responsibility for the business as a whole." *Id.*

¹⁶⁷ See Deakin & McLaughlin, *supra* note 101, at 323.

¹⁶⁸ See *id.* at 320–21, 324, 326.

¹⁶⁹ See *id.* at 320, 324–25 (describing one form of reflexive law as imposing a default rule that allows the parties to negotiate variances to the statutory norm, and describing the opt-out as a failed version of this form because of the lack of "collective routes" for negotiation and "the ease with which employers could impose opt-outs on individual workers").

¹⁷⁰ See *id.* at 323–26.

¹⁷¹ See Schultz & Hoffman, *supra* note 66, at 144–49.

¹⁷² See *id.*

¹⁷³ *Id.* at 147.

consider not just individual procedural rights, but to consider “collective reflexive” forms of regulation as well. Collective reflexive laws would vest new procedural rights and establish mechanisms for information exchange at a group-based level, rather than relying exclusively on the creation and exercise of individual employee rights. One barrier to such an approach is what Professor Arnow-Richman refers to as “the absence of obvious substantive tie-ins,”¹⁷⁴ to which a procedural right could most easily be attached. In the context of women’s employment equality and workplace flexibility, existing substantive rights are limited to the antidiscrimination mandate in the Pregnancy Discrimination Act and the narrow leave entitlements in the FMLA—both of which are framed in terms of individual employee rights.

While the political viability of enacting new free-standing reflexive laws may indeed be questionable, there may be other routes for such experimentation beyond just attempting to *add* a new procedural obligation to an existing substantive right. In the context of the four-day work week, two examples exist in which a substantive entitlement instead was used as a *bargaining chip* to facilitate the creation and design of new collective reflexive rights. Those examples are California’s Workplace Flexibility Act and the Federal Alternative Work Schedules Act, which are described below.

A. *The California Workplace Flexibility Act*

The first example of collective reflexive regulation comes from California, which is one of only a few states that provide most non-exempt employees with the substantive right to receive daily overtime premium pay.¹⁷⁵ Under federal law, as well as most state laws, overtime premium

¹⁷⁴ Arnow-Richman, *supra* note 100, at 85–86.

¹⁷⁵ See CAL. LAB. CODE § 510 (West 2003) (establishing the basic daily overtime rules). Various California wage orders exempt certain employees from the daily overtime obligations. See, e.g., CAL. DIV. OF LABOR STANDARDS ENFORCEMENT, ENFORCEMENT POLICIES AND INTERPRETATIONS MANUAL § 56.2.1.1 (2007), available at http://www.dir.ca.gov/dlse/DLSEManual/dlse_enfmanual.pdf [hereinafter INTERPRETATIONS MANUAL] (noting that agricultural workers are allowed to work up to ten hours per day without an employer incurring overtime premium obligations). Other states and territories that impose daily overtime obligations include: Alaska, ALASKA STAT. § 23.10.060 (2008) (requiring overtime premiums for hours over eight in a single day); Colorado, Colorado Minimum Wage Order No. 25, 7 COLO. CODE REGS. § 1103-1 (2009) (requiring overtime premiums for hours over twelve in a single day); Florida, FLA. STAT. § 448.01 (West 2002) (requiring overtime premiums for hours over ten in a single day); Nevada, NEV. REV. STAT. ANN. § 608.018 (2006) (requiring overtime premiums for hours over eight in a single day, except by mutual agreement in certain situations); Puerto Rico, P.R. LAWS ANN. tit. 29, § 274 (2001) (requiring overtime premiums for hours over eight in a single day); and the Virgin Islands, V.I. CODE ANN. tit. 24, § 20 (1997) (requiring overtime premiums for hours over eight in a single day under certain circumstances). Some other states impose daily overtime requirements for employees in certain industries, occupations, or work sectors. E.g., OR. REV. STAT. § 652.020 (2007) (requiring daily overtime premiums in certain circumstances for certain employees at mills, logging camps, and manufacturing enterprises); WYO. STAT. ANN. § 27-5-

rates are triggered only when an employee's hours exceed forty in a single work week.¹⁷⁶ In California, employers additionally are required to pay most of their non-exempt workers at a premium rate for all hours over eight in a single work day: at a rate of one and one-half times the regular rate of pay for hours over eight, and twice the regular rate of pay for hours over twelve.¹⁷⁷ These daily overtime obligations create a financial disincentive for California employers to use compressed work weeks. A California employer using a 4/10 schedule, for example, would incur overtime premium liability for eight hours each week that it would avoid by spreading the forty hours over a standard five-day, eight-hour-per-day schedule.

To the extent that employers are otherwise motivated to experiment with four-day work weeks, daily overtime obligations effectively bring employees to the bargaining table with extra leverage. In California's political process, this leverage resulted in the enactment of the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999 (the "Workplace Flexibility Act").¹⁷⁸ The Workplace Flexibility Act essentially codified employees' willingness to give up their daily overtime premiums only in exchange for obtaining some control over the adoption and design of a compressed work schedule. The Workplace Flexibility Act is primarily a reflexive law, and it is unique in establishing collective employee control within private, non-organized workforce settings.

Like other reflexive laws, the Workplace Flexibility Act largely establishes procedures, rather than substantive rights. If an employer follows the established procedures, the employer may adopt a compressed work schedule that qualifies the employer for an exemption from some or

101 (2009) (requiring overtime premiums for hours over eight in a single day for state and county employees).

¹⁷⁶ See Fair Labor Standards Act, 29 U.S.C. § 207(a)(1) (2006); 29 C.F.R. § 778.102 (2009); see also *supra* note 175 (listing the small group of states that impose daily overtime premiums).

¹⁷⁷ See CAL. LAB. CODE § 510(a).

¹⁷⁸ 1999 Cal. Legis. Serv. Ch. 134 (A.B. 60) (West) (codified at CAL. LAB. CODE §§ 500–58 (West 2003)). Former California Governor Gray Davis signed the law on July 20, 1999, and it became effective on January 1, 2000. See Bette E. Robin, *The Impact of the New Alternative Work Schedule on Dental Offices*, 29 J. CAL. DENTAL ASS'N 289, 289 (2001). The Act was in response to the California Industrial Welfare Commission's ("IWC") elimination of daily overtime obligations in 1998, which was itself a response to former California Governor Pete Wilson's efforts to eliminate the state's daily overtime obligations. See Tyler M. Paetkau, *Time Off in California: State and Federal Laws on Employee Leave, Vacations and Holidays*, LAWMEMO, <http://www.lawmemo.com/articles/timeoff.htm> (last visited Apr. 11, 2010); Cal. Exec. Order Nos. W-75-94 (1994), W-84-94 (1994), W-142-97 (1997) (issued by Governor Pete Wilson to suspend daily overtime for certain workers); Letter from Pete Wilson, Governor of California, to Members of the Industrial Welfare Commission (Sept. 8, 1995), available at http://www.dir.ca.gov/Bulletin/Oct_Nov_95/IWC_Letter.html (requesting the repeal of daily overtime obligations). The Workplace Flexibility Act authorized the IWC to issue implementing regulations, which the IWC has done in the form of various Wage Orders. See CAL. LAB. CODE § 517 (West 2003); see also Robin, *supra*, at 289–93 (describing the regulatory process).

all of the otherwise mandatory daily overtime obligations.¹⁷⁹ The procedures apply not just to four-day work week schedules, but to “any regularly scheduled workweek requiring an employee to work more than eight hours in a 24-hour period.”¹⁸⁰ Because the procedures focus primarily on groups of employees in “readily identifiable work unit[s],” and only secondarily on employees as individuals, the Workplace Flexibility Act indirectly provides affected employees with a collective voice over the adoption and design of compressed work schedules.¹⁸¹

Under this collective reflexive approach, an employer must first submit a written proposal for a compressed work week to all employees in an affected work unit.¹⁸² The proposal must specify the number of days in the work week and the number of hours in each work shift that would be required under the proposed compressed schedule.¹⁸³ The proposal may include either a single compressed work week option or a menu of compressed work schedules from which employees within a work unit would be permitted to choose.¹⁸⁴

The employer must then hold a secret ballot election for all employees within the work unit that would be affected by the proposed schedule.¹⁸⁵ The employer must hold the election during regular working hours at the employees’ work site.¹⁸⁶ At least two-thirds of the employees in the affected work unit must vote in favor of the compressed work week for the schedule to become certified for a daily overtime exemption.¹⁸⁷ At least fourteen days before the election, the employer must hold a meeting in which the employer provides to the employees in the affected work unit a written disclosure of how the proposed schedule would affect hours,

¹⁷⁹ See CAL. LAB. CODE § 510(a)(1); see also CAL. LAB. CODE § 511(a) (West Supp. 2010) (describing the procedures that an employer must follow to qualify a compressed work schedule for the daily overtime exemption authorized in CAL. LAB. CODE § 510(a)(1)).

¹⁸⁰ See INTERPRETATIONS MANUAL, *supra* note 175, § 56.24.

¹⁸¹ See CAL. LAB. CODE § 511(a); see also *id.* § 511(i) (defining a “work unit” to include “a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision thereof”); INTERPRETATIONS MANUAL, *supra* note 175, § 56.8.2 (describing the criteria for identifying a “work unit”). The collective focus of the Workplace Flexibility Act may have been undermined by recent amendments in May 2009. See Paul R. Lynd, *California Adds Modest Flexibility to Alternative Workweek Schedules*, EMP. L. ALERT (Nixon Peabody LLP), May 15, 2009, at 1–2, available at http://www.nixonpeabody.com/linked_media/publications/Employment_Law_Alert_05_15_09.pdf. Those amendments clarified that a “work unit” may contain a single employee, as long as the single employee meets the general criteria for a work unit. See 2009 Cal. Legis. Serv. 2d Ex. Sess. Ch. 3 (A.B.5) (West) (codified at CAL. LAB. CODE § 511(i)).

¹⁸² See CAL. LAB. CODE § 511(a) (requiring a “proposal” by the employer); INTERPRETATIONS MANUAL, *supra* note 175, § 56.7.1 (requiring that the proposal be in writing).

¹⁸³ INTERPRETATIONS MANUAL, *supra* note 175, §§ 56.7.1–2.

¹⁸⁴ CAL. LAB. CODE § 511(a); INTERPRETATIONS MANUAL, *supra* note 175, § 56.7.2.1.

¹⁸⁵ CAL. LAB. CODE § 511(a); INTERPRETATIONS MANUAL, *supra* note 175, § 56.8.

¹⁸⁶ INTERPRETATIONS MANUAL, *supra* note 175, § 56.8.

¹⁸⁷ CAL. LAB. CODE § 511(a); INTERPRETATIONS MANUAL, *supra* note 175, § 56.8.1.

wages, and benefits.¹⁸⁸ The employer must provide this written disclosure in multiple languages if more than five percent of the employees in the work unit primarily speak a language other than English.¹⁸⁹ The employer must mail the written disclosure to any employees who do not attend the meeting.¹⁹⁰

The implementing regulations for the Workplace Flexibility Act include a variety of safeguards to help ensure that the results of an alternative work week election reflect the true desires of the employees in the work unit. Although employers are free to express opinions regarding a compressed work schedule, employers are prohibited from intimidating or coercing employees to vote in a particular way.¹⁹¹ Employers may not engage in indirect coercion by ensuring that employees are absent from the election because adopting a proposed schedule requires not just two-thirds of the employees who actually vote, but two-thirds of all affected employees in a work unit.¹⁹² In addition to requiring a secret ballot to reduce the risk of individual retaliation, the law also prohibits an employer from reducing any employee's regular rate of pay as the result of the overall election results.¹⁹³

If an employer follows these procedures and obtains the requisite two-thirds affirmative vote by the employees in an affected work unit, the employer may adopt the proposed compressed work week without incurring all of the standard daily overtime obligations.¹⁹⁴ Nothing in the Workplace Flexibility Act prohibits employers from unilaterally imposing a four-day work week or other form of compressed schedule without following any of these procedures—nor does it prohibit individual employees from unilaterally requesting such schedules—as long as the employer complies with standard daily overtime obligations. The Act merely provides the incentive of avoiding standard daily overtime liability in exchange for following procedures that provide groups of employees with a voice in the process. To obtain this benefit, the employer must report the results of the secret ballot election to a designated state agency within thirty days after the results are final, at which point the compressed work schedule becomes a qualified plan.¹⁹⁵ For most occupational categories, a qualified compressed schedule exempts the employer from any daily overtime obligations for up to ten hours per day on scheduled

¹⁸⁸ INTERPRETATIONS MANUAL, *supra* note 175, § 56.10. If the employer fails to comply with any of the disclosure procedures, the election will be invalid and will not entitle the employer to the overtime premium exemptions for its proposed compressed work schedule. *See id.* § 56.10.1.

¹⁸⁹ *Id.* § 56.10.

¹⁹⁰ *Id.*

¹⁹¹ *See id.* §§ 56.13, 56.13.2.

¹⁹² *See id.* § 56.8.3.

¹⁹³ *See* CAL. LAB. CODE §§ 511(a), (c); INTERPRETATIONS MANUAL, *supra* note 175, § 56.11.

¹⁹⁴ *See* CAL. LAB. CODE §§ 510(a)(1), 511(a).

¹⁹⁵ *See id.* § 511(e).

work days.¹⁹⁶ Employers would still be obligated to pay one and one-half the regular rate of pay for hours over ten and twice the regular rate of pay for hours over twelve on a scheduled work day, but an employer could use a 4/10 work week without incurring any overtime liability.¹⁹⁷

Once a compressed work week is certified under this procedure, employees also retain a collective right to repeal it. If one-third of the affected employees in a work unit present a signed petition to the employer, the employer must hold another secret ballot election within thirty days to determine whether the work unit wants to repeal the compressed schedule.¹⁹⁸ The same procedures that apply to the original election also apply to a repeal election, which requires an affirmative vote of at least two-thirds of the employees in the affected work unit for the repeal to succeed.¹⁹⁹ An employer must comply with the repeal of a compressed work week within sixty days after the election is final, unless the employer can demonstrate to the governing state agency that doing so would impose an “undue hardship.”²⁰⁰ Elections either to adopt or to repeal a compressed schedule may not be held more frequently than once per year.²⁰¹

In addition to the collective procedural rights that are the primary focus of the Workplace Flexibility Act, the Act also contains a secondary level of individual accommodation rights for employees who were eligible to vote in a successful election but who are unable to work the compressed schedule due to caregiving or other obligations.²⁰² The employer must make a “reasonable effort” to accommodate such employees by providing a work schedule that does not include more than eight hours per day.²⁰³ This limited opt-out right provides some flexibility for employees whose work/family circumstances fit better within a more traditional work week schedule.

In addition to addressing the critical component of employee choice and control, California’s Workplace Flexibility Act and its supporting regulatory wage orders also incorporate requirements that are responsive to

¹⁹⁶ See *id.* § 511(a)–(b).

¹⁹⁷ See *id.*; see also *Mitchell v. Yoplait*, 19 Cal. Rptr. 3d 267, 269–71 (Cal. App. Dep’t Super. Ct. 2004) (upholding the validity of an alternative work week schedule that used three twelve-hour shifts and one six-hour shift, which only obligated the employer to pay time and one-half for the hours over ten in each of the twelve-hour days). The overtime obligations are slightly different for some categories of workers, such as those in the healthcare industry. See INTERPRETATIONS MANUAL, *supra* note 175, § 56.3.2 (explaining that employees in the healthcare industry may agree to compressed work weeks that exempt an employer from any overtime obligations for up to twelve-hour days under certain circumstances).

¹⁹⁸ INTERPRETATIONS MANUAL, *supra* note 175, §§ 56.17, 56.17.1, 56.17.2.

¹⁹⁹ See *id.* §§ 56.17.2, 56.17.3.

²⁰⁰ *Id.* § 56.17.6.

²⁰¹ *Id.* § 56.17.4.

²⁰² See CAL. LAB. CODE § 511(d); INTERPRETATIONS MANUAL, *supra* note 175, § 56.19.

²⁰³ CAL. LAB. CODE § 511(d); INTERPRETATIONS MANUAL, *supra* note 175, § 56.19.

a variety of work/family issues that might arise from a four-day work week or other compressed schedule. For example, employers may not implement the compressed schedule after a valid election for at least thirty days,²⁰⁴ which gives employees time to modify their childcare arrangements before the change takes place. For most occupational categories, the compressed schedule will not be certified unless it provides for at least four hours of work on any scheduled work day,²⁰⁵ which can reduce childcare challenges that may arise with very short-hour needs on particular days and very long-hour needs on others. Most occupational categories also require the compressed schedule to contain at least two consecutive days off,²⁰⁶ which ensures that significant blocks of time will exist each week that may be dedicated to family-related activities. The law also permits employers to allow employees to request a substitution of one regularly-scheduled work day for another similar-length work day to accommodate employees' personal needs without losing the employer's overtime exemption.²⁰⁷ That provision can provide flexibility for employees who need occasional schedule changes for unpredictable caregiving needs, such as a sick parent or child. Although the Workplace Flexibility Act eliminates a significant component of the standard daily overtime obligations, it does not eliminate overtime premiums altogether, thereby retaining a disincentive for employers to design compressed schedules that include days over ten hours long, which can be particularly difficult from a childcare and family balance perspective.²⁰⁸

The Workplace Flexibility Act also creates incentives for schedule predictability once the compressed schedule is in place, which often is crucial for employees who are trying to manage both work and family obligations. Although an employer's original proposal need only identify the number of days and hours per day that the compressed schedule will entail, the employer must assign each employee a "regularly-scheduled" shift with advance notice of the start and end times of each scheduled work day before the compressed schedule takes effect.²⁰⁹ The employer must give an employee at least one week's notice before changing any

²⁰⁴ INTERPRETATIONS MANUAL, *supra* note 175, § 56.17.8.

²⁰⁵ *See id.* § 56.3.3.

²⁰⁶ *See id.* § 56.4.

²⁰⁷ *See id.* § 56.23.9.

²⁰⁸ *See* CAL. LAB. CODE § 511(a)–(b) (retaining the obligation to pay one and one-half the regular rate for hours over ten on a regularly-scheduled day and twice the regular rate for hours over twelve on a regularly-scheduled day).

²⁰⁹ *See* INTERPRETATIONS MANUAL, *supra* note 175, § 56.23; *see also id.* § 56.7.2 (specifying the required information in an alternative work week proposal and requiring the proposed schedule to have a specified number of "regularly recurring work days"); *id.* § 56.7.2.7 (noting that the statute "does not allow a situation where the employee may opt to work an alternative workweek or a normal workweek on an irregular basis for that would not meet the criteria of 'regularly scheduled'"). The regulations do permit a compressed schedule to differ from week to week, "so long as the schedule is regular and recurring," for example, by having two different schedules that regularly alter weeks. *See id.* § 56.7.3.

scheduled days or hours, and if schedule changes are more than “occasional” occurrences,” the employer will lose its daily overtime exemption.²¹⁰ Additionally, the Act imposes overtime liability when an employer requires an employee to work hours or days outside of the employee’s regular schedule. For an employee working longer than eight hours in a day, the employer must pay one and one-half times the regular rate of pay for hours beyond those regularly scheduled that day, and twice the regular rate of pay for any such hours over twelve.²¹¹ The employer also must pay twice the regular rate of pay for any hours beyond eight on a non-regularly-scheduled day.²¹² Overall, these rules create incentives for an employer not to deviate from the established four-day work week or other qualified compressed work schedule.

Not surprisingly, many employers’ representatives and business groups have criticized the Workplace Flexibility Act as antithetical to flexibility, and they have regularly lobbied for legislation that would make it easier for employers to avoid daily overtime obligations.²¹³ These lobbying efforts recently have begun to incorporate work/family rhetoric by attempting to link employers’ desire to expand their ability to adopt four-day work weeks without incurring daily overtime premiums with an interest in “accommodat[ing] diverse family obligations.”²¹⁴ The legislation proposed by these business groups, however, is striking in its general abandonment of the existing legal safeguards that recognize the importance of employee control, scheduling predictability, and other criteria for maximizing the work/family benefits of compressed work schedules.

Despite reasons to be wary of the business community’s eleventh-hour interest in work/family balance as a motive for seeking to reduce daily overtime obligations, business representatives may be accurate in

²¹⁰ See *id.* §§ 56.23.1, 56.23.2.

²¹¹ CAL. LAB. CODE § 511(b); INTERPRETATIONS MANUAL, *supra* note 175, § 56.23.3.

²¹² CAL. LAB. CODE § 511(b); INTERPRETATIONS MANUAL, *supra* note 175, §§ 56.23.3, 56.23.8.

²¹³ See, e.g., *CalChamber Urges Support for Flexible Work Schedules*, CALCHAMBER, Mar. 17, 2008, <http://www.calchamber.com/headlines/pages/03172008ts.aspx> (quoting a policy advocate for the California Chamber of Commerce who argued that the Workplace Flexibility Act “effectively eliminates most employers and employees from choosing alternative options,” because “[a]ny deviation from the rigidly controlled process voids the election and subjects the employer to potential lawsuits that can seek up to three years of back overtime pay for affected workers”); Paetkau, *supra* note 178 (describing the Workplace Flexibility Act’s procedures as “restrictive, cumbersome and costly”); Sidley Austin LLP, *Los Angeles Labor & Employment Alert: The New Millennium Means the Return of Daily Overtime*, FINDLAW, 1999, available at <http://library.findlaw.com/1999/Jul/1/131002.html> (predicting that “few employers will utilize the alternative workweek schedules” authorized by the Workplace Flexibility Act because they “provide very little scheduling flexibility, and impose significant procedural burdens on employers”); *Legislation Loosens Up Alternative Work Week Schedule Rules*, SMALL BUSINESS CAL., Apr. 10, 2009, <http://www.smallbusinesscalifornia.org/Alternative%20Work%20Week%20Schedule.htm> (describing the election process as “convoluted”).

²¹⁴ See *Employer, Employee Testimony Illustrates Need for Flexible Work Schedules*, CALCHAMBER, Apr. 10, 2008, <http://www.calchamber.com/headlines/pages/04102008ts.aspx>; see also *CalChamber Urges Support*, *supra* note 213.

describing the existing procedural requirements as too cumbersome to ever be widely used. Although employers are required to report all election results to a designated state agency, the agency's recordkeeping methods make it difficult to determine accurately how many California employers currently are operating under a certified compressed work schedule. The California Division of Labor Statistics and Research maintains a searchable online database of all California employers that have filed alternative work week election results.²¹⁵ This database includes an entry for every report that the agency has received since the Workplace Flexibility Act became effective on January 1, 2000—totaling over 18,500 entries.²¹⁶ For several reasons, that total likely exceeds the number of California employers that currently are operating under a certified compressed work plan. First, the entries include reports of unsuccessful elections to adopt a compressed schedule, as well as reports of successful elections to repeal previously adopted plans. Second, there are many instances of multiple entries for single employers, many of which file separate reports for multiple elections in different work units within their organization. Finally, there is no way to easily determine whether the employers listed in the database are still using their certified alternative work schedules, whether the affected work units still exist, or whether the employers are even still in business. Nevertheless, the over 18,500 entries at least provide an upper limit to the estimated number of employers that have used the election procedures to adopt an eligible compressed work plan.²¹⁷

While business interest groups might use this data to support their critique of California's Workplace Flexibility Act as going too far, some work/family advocates may criticize the law from the opposite direction, by questioning whether the law's procedural mechanisms do enough to enable the expression of a collective employee voice. While the Act removes the initial burden that individual reflexive laws place on individual employees to initiate the process, it does so by giving employers—not groups of employees—the ability to control the

²¹⁵ See Alternative Workweek Elections Database, <http://www.dir.ca.gov/databases/dlsr/DLSR-AWE.html> (last visited Apr. 11, 2010).

²¹⁶ See *id.* (click "dlsr-awe.zip"). California Labor Code section 511(e) requires that employers report the results of all such elections to the Division of Labor Statistics and Research within thirty days after the results are final. CAL. LAB. CODE § 511(e). The IWC's implementing wage orders require that the reports of election results be made public. See, e.g., Industrial Welfare Commission Order 4-2001 Regulating Wages, Hours, and Working Conditions in the Professional, Technical, Clerical, Mechanical and Similar Occupations, ¶3(C)(6) (effective Jan. 1, 2001 as amended), available at <http://www.dir.ca.gov/IWC/IWCArticle4.pdf>.

²¹⁷ This observation is consistent with one published estimate on March 31, 2006, that "[a]bout 11,000 of the state's 800,000-plus employers" were then operating under a certified alternative work week plan. See Posting of Cal Labor Law to California Labor & Employment Law Blog, <http://www.callaborlaw.com/archives/new-laws-legislation-two-bills-introduced-to-increase-workweek-flexibility.html> (Mar. 31, 2006).

parameters of the discussion. The Act empowers employers to select the specific alternative work schedules to include in a proposal to an affected work unit, rather than vice versa. While the Act grants employees collective control over the results of an employer's proposal, employees' collective voice in designing workplace schedules is largely constrained to merely affirming or rejecting what an employer puts on the table. Such an approach certainly can help the parties identify *some* alternative work schedules that will be mutually beneficial, and it allows employers to obtain valuable aggregate data about employees' desires and working time constraints. Nevertheless, this particular collective reflexive approach falls short of envisioning and situating employees as creative collaborators in the process.

B. *The Federal Alternative Work Schedules Act*

The Federal Employees Flexible and Compressed Work Schedules Act, which is also known as the Alternative Work Schedules Act ("AWSA"),²¹⁸ provides the second example of a collective reflexive form of regulation in the context of the four-day work week. Like California's Workplace Flexibility Act, the AWSA's existence is linked to the existence of daily overtime obligations. As in California, most non-exempt federal employees are entitled to daily overtime premiums for all hours over eight in a single work day.²¹⁹ When the federal government became interested in encouraging compressed work weeks as a traffic congestion measure and as a response to the oil crisis of the 1970s, legislators were able to use the carrot of reduced payroll expenses for daily overtime as an incentive to encourage federal agencies to experiment with a four-day work week.²²⁰

Similar to California law, the AWSA establishes a procedure by which a federal agency may adopt a compressed work week that is exempt from most of the standard daily overtime requirements.²²¹ In a non-organized work unit of a federal agency, this procedure requires an affirmative vote of a majority of the employees in an affected work unit.²²² Unlike

²¹⁸ Federal Employees Flexible and Compressed Work Schedules Act, 5 U.S.C. §§ 6120–6133 (2006); see Liechty & Anderson, *supra* note 1, at 305 (noting the common name).

²¹⁹ 5 U.S.C. § 5542(a)(1) (2006).

²²⁰ See Liechty & Anderson, *supra* note 1, at 307–10 (describing the history of the AWSA).

²²¹ See 5 U.S.C. §§ 6127–6128. The AWSA regulates both the use of compressed work weeks and the use of flexible schedules that allow employees to vary their daily arrival and departure times within certain parameters. See *id.* §§ 6122–6126. This Article limits its focus to the rules governing compressed work weeks.

²²² See *id.* § 6127(b)(1). A work unit is defined for purposes of the AWSA as "an entity located in one place with a specific mission, with homogeneous procedures or technology, and headed by a supervisor or manager authorized to approve time and attendance reports and approve leave." U.S. OFFICE PERS. MGMT., HANDBOOK ON ALTERNATIVE WORK SCHEDULES § 2 (1996) [hereinafter HANDBOOK ON ALTERNATIVE WORK SCHEDULES].

California law, the AWSA and its supporting agency documents do not specify any details regarding the voting process, which gives agencies much greater flexibility in conducting elections.²²³ Similar to California law, the AWSA includes a secondary individual accommodation right when the compressed work schedule would “impose a personal hardship” on an employee due to caregiving responsibilities or for any other reason.²²⁴ Employers that adopt compressed work schedules under the AWSA are required to establish a procedure for employees to submit their personal hardship requests.²²⁵ As a public employer, a federal agency always retains the right to end a compressed work schedule if the agency finds an adverse impact on productivity, provision of services, or cost of operations, unlike under California law, which vests a repeal right in the hands of affected employees in private workplace settings.²²⁶ The AWSA does incorporate some of the provisions found in California law that address work/family balance issues, such as encouraging schedule predictability by retaining standard overtime premiums whenever an employee is required to work hours beyond those regularly scheduled under the compressed work plan.²²⁷

The streamlined procedures for adopting a compressed work week under the AWSA may have contributed to their more widespread use within federal agencies than within the private sector that is governed by the more complicated procedures under California law. Nevertheless, many federal agencies still may not have experimented with the full extent of flexible workplace options permitted and encouraged by the AWSA.²²⁸

²²³ See 5 U.S.C. § 6127(b)(1); see also HANDBOOK ON ALTERNATIVE WORK SCHEDULES, *supra* note 222, § 7(b) (stating that “[i]n an unorganized unit, a majority of affected employees must vote to be included in a [compressed work schedule] program”); *id.* § 13(o)(1) (explaining that “a compressed work schedule may not be established in an unorganized unit unless a majority of employees in the organization who would be included vote to be included,” which requires that “the number of affirmative votes exceeds fifty percent of the number of employees and supervisors in the organization proposed for inclusion in a compressed work schedule”).

²²⁴ See 5 U.S.C. § 6127(b)(2). The employee is required to make a written request to the agency. *Id.* If the agency determines that the employee’s participation in the compressed schedule would impose a personal hardship, the agency must either except the employee from the compressed schedule or reassign the employee to the first available position within the agency that is not part of the compressed work week plan and for which the employee is qualified. *Id.* See also HANDBOOK ON ALTERNATIVE WORK SCHEDULES, *supra* note 222, § 13(p)(2) (explaining how agencies should determine whether a personal hardship exists and identifying caregiving responsibilities for “disabled family members or dependent children” as potential grounds for a hardship finding).

²²⁵ See HANDBOOK ON ALTERNATIVE WORK SCHEDULES, *supra* note 222, § 13(p)(1).

²²⁶ See 5 U.S.C. § 6131(a).

²²⁷ See *id.* § 6128(b).

²²⁸ See U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, ALTERNATIVE WORK SCHEDULES: MANY AGENCIES DO NOT ALLOW EMPLOYEES THE FULL FLEXIBILITY PERMITTED BY LAW 4, 14 (1994), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/13/4f/c7.pdf (concluding from a review of fifty-nine federal agencies that although “large numbers of employees” are using either flexible or compressed schedules, “many employees are not allowed to use [alternative work schedules], and few organizations allow their employees to use the options offering the greatest flexibility”).

In 1994, the United States General Accounting Office surveyed fifty-nine federal agencies and found that fifty-seven of them offered some form of flexible work scheduling authorized by the AWSA for at least some of their employees.²²⁹ This survey, however, also found that many employees who desired greater scheduling flexibility were not permitted to use various options that are authorized by the AWSA and that few agencies used the permissible scheduling options that provided employees with the greatest control over their working hours.²³⁰ Despite finding that “large numbers of employees in many organizations” were using flexible options authorized by the AWSA, the report recommended moving beyond the Act’s existing reflexive approach that merely creates incentives for experimenting with workplace flexibility, by requesting a Presidential Executive Order requiring all federal agencies to adopt alternative work schedule programs.²³¹

While it would be helpful to obtain more recent data to fully assess the AWSA’s effects, this report’s conclusion highlights the obvious point that, like all work/family policy initiatives, the collective reflexive approaches in California’s Workplace Flexibility Act and the federal AWSA will never be the singular solution to work/family conflict. Both of these examples themselves incorporate multiple regulatory approaches, as both supplement their primary grants of collective process rights with secondary opt-out entitlements in the form of individual accommodation rights. In doing so, these laws not only illustrate one particular incarnation of a collective reflexive approach, but also illustrate how this under-developed approach might work as a component of broader work/family regulatory reforms. Collective reflexive approaches possess the same potential strengths of reflexive regulation more generally: they facilitate information exchange in a non-adversarial forum that encourages jointly-designed and tailored solutions to the structuring of working time within a particular workplace. At the same time, collective reflexive approaches attempt to address the risk of under-utilization in models that depend exclusively on the ability and willingness of individual employees to initiate and participate in a workplace procedure. In addition, these collective reflexive approaches may facilitate a broader exchange of relevant information within a workplace, which could further advance the goal of achieving scheduling innovation that is beneficial to employers and employees alike.

Of course, the existence of both the California Workplace Flexibility Act and the federal AWSA depended, somewhat paradoxically, upon the existence of a legal *disincentive* to workplace flexibility—i.e., upon the existence of daily overtime premium obligations. While this fact may limit

²²⁹ *Id.* at 4.

²³⁰ *Id.* at 14.

²³¹ *Id.*

the potential for experimenting with similar approaches elsewhere, it also highlights the importance of work/family proposals that focus on revising wage and hours laws as a necessary first step toward more fundamental working time innovation.²³² In addition, both the California Workplace Flexibility Act and the federal AWSA assume, to a large degree, a pre-existing norm of a forty-hour work week. Thus, like all four-day work week initiatives, they share a limited ability to reach the often acute work/family conflicts experienced by the growing population of workers laboring at both ends of the time divide. Nevertheless, they provide interesting models of an under-developed strand of reflexive regulation that is worth considering, not just in capitalizing on the unique opportunity to influence the current four-day work week debate, but also when considering future regulation of workplace flexibility more generally.

IV. CONCLUSION

According to the headline of a *Time* article in September 2009, “The Four-Day Workweek Is Winning Fans.”²³³ On the heels of Utah’s adoption of a four-day work week for approximately 17,000 of its public employees, such headlines have become commonplace, as both the economic crisis and environmental concerns have converged to bring compressed work weeks to center stage.²³⁴ Although work/family concerns have not played a driving role in this recent intense interest in the four-day work week, advocates increasingly have begun to invoke work/family benefits as a way to win additional fans. Utah’s experience is illustrative. While former Utah Governor Jon Huntsman made it clear that reducing energy expenses was the motivation for his Executive Order moving most of his state’s employees to a four-day work week,²³⁵ Utah’s Executive Director for Human Resources, Jeff Herring, was quick to

²³² See, e.g., JACOBS & GERSON, *supra* note 5, at 183–87 (proposing to eliminate the white-collar exemptions from the FLSA to bring a larger proportion of the workforce within the law’s overtime premium rules, and to move the standard work week from forty to thirty-five hours per week); Schultz & Hoffman, *supra* note 66, at 140–41 (same).

²³³ Bryan Walsh, *The Four-Day Workweek Is Winning Fans*, TIME, Sept. 7, 2009, <http://www.time.com/time/magazine/article/0,9171,1919162,00.html>.

²³⁴ See, e.g., Brock Vergakis, *4-Day Week Seems To Work Well for Utah*, BOSTON GLOBE, Mar. 1, 2009, http://www.boston.com/news/nation/articles/2009/03/01/4_day_week_seems_to_work_well_for_utah/; *Utah Is Going to a 4-Day Workweek: In an Effort To Save Energy, State Employees Will Get Friday Off*, MSNBC, July 3, 2008, <http://www.msnbc.msn.com/id/25518225/>; *Utah’s 4-Day Workweek Brings Some Dividends*, CONNECT2UTAH, Oct. 22, 2009, <http://connect2utah.com/content/news/story/?cid=58071>.

²³⁵ See Utah Exec. Order No. 2008/0006 (July 31, 2008), *reprinted in* 16 Utah Bull. 1 (Aug. 15, 2008), *available at* http://www.rules.utah.gov/publicat/bull_pdf/2008/b20080815.pdf; see also Vergakis, *supra* note 234 (noting that Utah switched most of its state employees to a four-day work week “primarily to save money on electricity, gasoline, and other energy expenses”); *Utah Is Going to a 4-Day Workweek*, *supra* note 234 (describing the estimated energy savings that a four-day work week would produce); *Utah’s 4-Day Workweek Brings Some Dividends*, *supra* note 234 (noting “Former Gov. Jon Huntsman made the switch for Utah in August 2008, largely to cut energy costs”).

promote the plan to the media as a way to “‘really make a difference for work-life balance.’”²³⁶ The federal AWSA similarly began as a traffic control and energy conservation measure, but decades later gave President Clinton something to point to when addressing the growing concerns of employees who are balancing work and family demands.²³⁷

The recent spotlight on the four-day work week provides work/family advocates with a unique opportunity to enter the public debate and raise awareness about the real potential—and real limitations—of this particular form of working time innovation. This includes the opportunity to educate policy makers, the public, and the press about the heterogeneous sources of work/family conflict and the very different needs of workers who are laboring at different occupational statuses, different income levels, and different points along the time divide. While the empirical research indeed supports the claim that a compressed work schedule can enhance work/family balance for some workers, the four-day work week is unlikely to become available for many workers whose often acute work/family conflicts result from very long-hour positions, or from very unpredictable and insecure short-hour jobs. While the four-day work week may provide real benefits to some groups of workers, including those working asocial and often variable shift-work, work/family advocates need to challenge undifferentiated assertions of work/family benefits from a compressed work week design.

While these observations might lead work/family advocates to shift their priorities elsewhere, the current attention being paid to the four-day work week offers the further opportunity to consider how legal regulation might be used most effectively to advance workplace flexibility for a broader group of workers. To that end, the unique regulations in California’s Workplace Flexibility Act and the federal AWSA illustrate an under-developed “collective reflexive” approach that may add a new dimension to future workplace flexibility reform efforts. To the extent that the four-day work week helps facilitate these types of continued legal and policy discussions about how to restructure the workplace around the norm of a worker with caregiving responsibilities, I have become a fan as well.

²³⁶ See Walsh, *supra* note 233.

²³⁷ See Liechty & Anderson, *supra* note 1, at 307–14 (chronicling the legislative history of the AWSA).